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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 212

SOUTHERN PACIFIC COMPANY, APPELLANT,

vs.

JOHN C. CORBETT, FRED E. STEWART, RICHARD E. COLLINS, WILLIAM G. BONELLI AND HARRY B. RILEY, AS MEMBERS OF THE STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA

FILED JULY 19, 1938.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 4, 1938.

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[fol. 1]

IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Equity No. 4055-R

SOUTHERN PACIFIC COMPANY (a Corporation), Plaintiff,

vs.

JOHN C. CORBETT, FRED E. STEWART, RICHARD E. GOLLINS, Ray L. Edgar, and Ray L. Riley, as Members of the State Board of Equalization of the State of California; State Board of Equalization of the State of California, and U. S. Webb, the Attorney General of the State of California, Defendants

Action to Enjoin Collection of Taxes Under California Use Tax Act of 1935

BILL OF COMPLAINT—Filed July 10, 1936

[fol. 2] To the Honorable the District Court of the United States, in and for the Northern District of California, Southern Division:

Southern Pacific Company, a corporation, presents this, its verified bill of complaint, against the defendants above named and designated and for cause of action complains and alleges as follows:

I

Status of the Parties

(a) Plaintiff is, and at all times hereinafter mentioned, has been, a corporation duly organized and existing under and by virtue of the laws of the State of Kentucky, and a citizen and a resident of said State of Kentucky. Plaintiff now is, and at all times herein mentioned has been, engaged in the operation, as a common carrier in interstate commerce, of lines of railroad, situated in the States of Oregon, California, Nevada, Utah, Arizona, Texas and New Mexico, and in the transportation of passengers and property from, to and between points in each and all of said states, and

at all times herein mentioned plaintiff, as such interstate common carrier by railroad, has been and now is subject to the provisions of the Act of Congress, approved February 4, 1887, and acts amendatory thereof and supplementary thereto, known as the Interstate Commerce Act.

(b) The defendant, John C. Corbett, is a citizen and resident of the State of California residing in San Francisco in said state; the defendant Fred E. Stewart, is a citizen and resident of the State of California, residing in the City of Oakland in said state; the defendant Richard E. Collins, is a citizen and resident of the State of California, residing in the City of Redding in said state; the defendant Ray L. Edgar, is a citizen and resident of the State of California, residing in the City of San Diego in said state; and the defendant Ray L. Riley, is a citizen and resident of the State of California, residing in the City of [fol. 3] Sacramento in said state and said persons constitute the State Board of Equalization of the State of California.

(c) At all times hereinafter mentioned the defendant, State Board of Equalization of the State of California, was and now is, an official board, organized and existing under and by virtue of the constitution and laws of the State of California, consisting of the persons named and described in the foregoing paragraph, with the Controller of the State, Ray L. Riley, acting as an ex-officio member thereof.

(d) The defendant, U. S. Webb, is a citizen and resident of the State of California, residing in the City of San Francisco, and is the duly elected, qualified and acting Attorney General of the State of California.

II

Jurisdiction

The grounds upon which the jurisdiction of this court depends are as follows:

(a) This suit is one of a civil nature, in equity, between citizens of different states.

(b) The matter in controversy greatly exceeds, exclusive of interest and costs, the sum or value of $3,000.00 to wit, an alleged indebtedness for taxation claimed to be due to the State of California and payable to the said State Board

of Equalization in a sum of money amounting to Forty Seven Thousand, Seven Hundred Five and 72/100 Dollars, and also sums of money which will continue to accrue in the future under the provisions of the taxing act complained of in this action and the claims of the defendants thereunder.

(c) This suit arises under the Constitution and laws of the United States in that plaintiff seeks herein, pursuant to Sub-section 14 of Section 41, Title 28 of the U. S. Code, to [fol. 4] restrain and enjoin the enforcement of that certain statute of the State of California, hereinafter described, known as the Use Tax Act of 1935, Chapter 361, Statutes of 1935 of the State of California, to the extent that the taxes provided for in and by said Act are imposed on certain materials purchased in interstate and foreign transactions from sellers located outside of the State of California, and shipped in interstate and foreign transportation to the plaintiff at places within the State of California, for the purpose of use and thereafter used in conducting interstate railway transportation, which tax, so imposed under said Act, according to the particulars hereinafter related, constitutes a tax upon the use of such materials in carrying on interstate transportation and constitutes a tax and burden upon the privilege of using such materials in conducting interstate transportation and is a burden on interstate and foreign commerce contrary to and in violation of the provisions of Article I, Section 8, Clause 3, and Article I, Section 10, Clause 2 of the Constitution of the United States, and that the imposition and collection of said tax effectuates a taking of plaintiff's property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

(d) The damages and injury which plaintiff would sustain by reason of said statute if the enforcement thereof in the particulars herein complained of be not restrained are and would be great and irreparable, and the enforcement of collection of the taxes involved herein and claimed to be due from the plaintiff, and which would become due according to the terms of said statute, and the interpretations thereof by the defendants, and the claims for taxes asserted by said defendants against the plaintiff, would continue to run to large amounts and impose upon the plaintiff much accounting work and expense in connection with

[fol. 5] making returns and payments of said taxes; and by reason of penalty provisions of the said taxing act plaintiff cannot safely disregard the same and await suits for the collection of said taxes for the purpose of testing the validity thereof because large amounts of penalties would accrue and continue to accrue if such course were followed; and the purported remedy prescribed by said taxing act of payment of taxes under protest and suit to recover the same, being the only remedy allowed to the plaintiff under the terms of said act, would not and does not provide a prompt, speedy and adequate remedy at law because the purported remedy prescribed and directed in said statute is not a plain and certain remedy, is not a prompt and complete remedy, would not result in compensating plaintiff in full for all of the damages, losses and expenses which would be suffered by it, and would result in a multiplicity of actions in manner and form more particularly hereinafter related.

(e) In addition to the foregoing general statement as to the grounds upon which the jurisdiction of this court depends, the facts, circumstances and conditions hereinafter set forth in this bill of complaint, justify and necessitate the exercise of equity jurisdiction of this court, and the granting to the plaintiff of the relief herein sought, including relief by temporary restraining order, interlocutory and final injunction.

III

Description of Plaintiff's Lines of Railroad and Operations

Plaintiff's main lines of railroad extend from San Francisco, California, to Portland, Oregon; from San Francisco, California, to Ogden, Utah, and also from San Francisco, southeast to Los Angeles, California, and thence via Yuma and Tucson, Arizona, to El Paso, Texas, and thence [fol. 6] to Tucumcari, New Mexico. At each of said points as well as at numerous other points, plaintiff's lines connect with the lines of other interstate carriers and thus enter into and become a part of through routes of transportation of freight and passengers between all points of the United States, and to and from adjacent foreign countries. In addition to said main lines the plaintiff's transportation system consists of numerous branch lines extending therefrom. The miles of road operated at the close of the year 1935, as

reported to the Interstate Commerce Commission in Southern Pacific Company Annual Report, Table 412, was: total mileage (single track) Pacific Lines, 8783.45 miles, and for the State of California, 4,361.88 miles. The gross operating revenue of the Southern Pacific Company (Pacific Lines) for the year ended December 31, 1935, was $124,040,113.00, and that part thereof applicable to the State of California was $63,508,423.00. The said figures are the last available for a full year of operation. The gross operating revenue for the current year will probably exceed such amounts. The gross operating revenue aforesaid applicable to the State of California which was applicable respectively to interstate and intrastate operations, so far as the same could be allocated, and as reported by the plaintiff to the Railroad Commission of the State of California, was as follows: intrastate commerce, $26,926,287.00; interstate commerce, $34,988,335.00.

In the necessary operation, maintenance and repair of its railroad, plaintiff has and will purchase large amounts of materials, supplies, shop machinery, tools and equipment, printed matter and publications, a substantial part of which it buys in states other than California or in foreign countries and transports in interstate or foreign commerce into the State of California for its uses and purposes in conducting the operation, maintenance and repair of its said railroad. The seat of general management in the operation of said railroad is located at the City of San Francisco in [fol. 7] California, and large quantities of materials and supplies and the aforesaid items of property are purchased for use in the conduct of its business as a carrier within the State of California and elsewhere. Some of the materials and supplies and other articles of tangible personal property aforesaid are used in connection with certain overhead operations carried on and performed within the State of California for the benefit, and in connection with, the operations of the entire interstate railroad system so operated by the plaintiff because of the fact that general offices for the entire system are located within the State of California and certain general repair and maintenance shops and purchasing agents and stores for the purchase and distribution of supplies are located and operated for the use of said entire railway system at places within the State of California.

During the months of April, May and June, 1936, plaintiff purchased substantial quantities of tangible personal

property, and transported the same in interstate or foreign commerce into the State of California to various points on its said railroad for uses in the maintenance, repair and renewal of its railroad tracks and for the purposes of the operation of its railroad, consisting of steel rails, frogs, switches and track fastenings, purchased in states other than California; that said track materials were purchased for the sole, fixed and predetermined purpose of furthering and carrying into effect an existing maintenance program for the year 1936, requiring the replacement of existing rail, frogs, switches and track fastenings in said tracks, with such new rail, frogs, switches and track fastenings, and the said materials were or are in process of being transported in interstate commerce to the places of use, and thereafter in the regular course of business, were or will be placed in said railroad tracks, a highway of interstate commerce, to replace rail, frogs, switches and track fastenings removed [fol. 8] from said tracks. A list of said steel rail, frogs, switches and track fastenings so purchased, showing the purchase price, point of origin, and use for which purchased, is contained in the statement hereto attached, marked Exhibit "A" and by this reference made a part hereof. The total purchase price of said steel rail, frogs, switches and track fastenings upon which the tax hereinafter referred to and complained of is based, is the sum of $707,973.26 and the amount of tax claimed by said defendants to be due on account thereof under the terms of the said Use Tax Act of 1935 of the State of California, hereinafter described, is the sum of $21,239.20.

Also, during the months of April, May and June, 1936, plaintiff purchased in various states and in foreign countries, quantities of other materials and supplies, and other tangible personal property, for the purpose of use in the operation, maintenance and repair of its tracks, structures and equipment, and for the operation of its railroad, which were transported in interstate or foreign commerce, into the State of California to various points of use on its said railroad, consisting of lumber from Oregon for the repair of freight cars; sheet steel from Pennsylvania and Maryland for locomotive repairs, steel tires from Pennsylvania for locomotive repairs; steel tubing from Pennsylvania for locomotive repairs; car heating parts from Illinois and New York for passenger car repairs; glass from Pennsylvania for passenger car repairs; rolled steel wheels from Penn-

sylvania for passenger car repairs; pile driver parts from Wisconsin and Michigan for work equipment repairs; grease from Indiana for lubrication; cotton waste from New York, Wisconsin and Minnesota for lubrication; valve oil from Texas for lubrication; and large quantities of other items of tangible personal property for uses in the repair and maintenance of structures and equipment used in con- [fol. 9] ducting transportation, and materials, supplies, tools and equipment, printed matter and publications and miscellaneous items, used in the operation of said railway, a list of which items of tangible personal property showing the description thereof, purchase price, point of origin and use for which purchased, is shown in the statement attached hereto, marked Exhibit "B" and by this reference made a part hereof. The total purchase price of said materials upon which the tax hereinafter referred to and complained of is based, is the sum of $882,217.36, and the amount of tax claimed by defendants to be due thereon under the terms of the said Use Tax Act of 1935, is the sum of $26,466.52.

The plaintiff will, in the future, continue to purchase like materials for its purposes in conducting interstate transportation and in addition to the items specified on said Exhibits "A" and "B" the plaintiff will in the future purchase for like uses many other items and kinds of materials.

The estimated amount of taxes which will accrue during each succeeding quarterly taxing period as provided by said Act on account of tangible personal property purchased in interstate or foreign commerce by the plaintiff and which will be transported into the State of California, for use in the operation, maintenance and repair of its said railroad, according to the terms of said Use Tax Act of 1935, and the rulings and regulations made by said defendants, unless the collection of said tax is restrained by injunction, will amount to the sum of approximately $25,000.00.

Plaintiff says that because of the large mileage of the railroads so operated by it, it is necessary, in the interest of economy, enjoined upon said railroad by the Interstate Commerce Act and the legislative policy of Congress, to purchase much of its supplies in large quantities in anticipation of current and recurring needs, and to effect deliveries thereof to the extent reasonably possible in carload [fol. 10] lots, to its various points of distribution and uses,

to effect all possible economies in purchase, transportation and distribution, and that it is necessary to have supplies to meet current requirements distributed over its entire line of railroad in quantities and at the times necessary to anticipate regular current requirements, as well as the various emergency requirements, and to have such reserves in quantities necessary to meet constantly fluctuating demands and emergencies which result from changes in volume of transportation and the repairs which, from time to time, unavoidably arise from the destruction of property by reason of wrecks, derailments, fires, storms and other weather conditions and unavoidable casualties which arise in connection with conducting railroad transportation, and that materials so distributed and held for such uses and the process of distribution thereof is inseparably and essentially a part of the conduct of transportation by railway; and that the greater portion of said articles were and are specially designed for use in the operation, maintenance and repair of said railroad, or peculiarly adapted to railroad uses as aforesaid and are not suitable for any other use.

Said purchases were made by the plaintiff through the use of its operating capital consisting of money to current assets definitely devoted to the service of transportation, or through the credit of said plaintiff as a railroad engaged in the service of transportation and upon the purchase of said materials and the payment therefor, the expenses therefor are in due course charged into the operating expenses of said carrier to the appropriate accounts for operation, maintenance or repairs, according to the accounting rules and regulations prescribed for railroads engaged in interstate commerce under the provisions and requirements of the Interstate Commerce Act, and that all of said items of [fol. 11] tangible personal property so purchased by the plaintiff were devoted to the service of transportation immediately upon their purchase and that upon the purchase of said articles they immediately became a necessary and indispensable part of working capital, material, supplies, equipment and instrumentalities for the operation of said railroad and the said articles and each and all of them became, were and are instrumentalities used indiscriminately and inseparably in the operation, maintenance and repair of plaintiff's railroad for conducting interstate transportation and intrastate transportation from the time the same were purchased therefor, and any storage, use or con-

sumption thereof, which occurred within the State of California cannot be separated or segregated as between intrastate and interstate transportation, the said railroad contemporaneously carrying by means of the same organization and facilities, both intrastate and interstate commerce and said items and materials being from the time of purchase outside the State of California inextricably devoted to and used in service of both classes of commerce.

Plaintiff further says that said articles of tangible personal property sustained no storage of any character which intervened between the ending of the interstate transportation thereof which followed the purchase of said items of property, and the time when the same and each item thereof, was allocated and dedicated to uses in the conduct of transportation by plaintiff's railroad but, on the contrary, the said materials and each item thereof, were purchased by said plaintiff outside of the State of California for the sole and exclusive use and conduct of its business as an interstate carrier and that at all times from the purchase of said materials until use of said materials and each item thereof by said plaintiff said materials were devoted, dedicated and inseparably set apart exclusively for use in interstate com-
[fol. 12] merce; that prior to any keeping or retention of said materials within the State of California, said materials were allocated and dedicated to sole and exclusive use in interstate commerce and any keeping or retention thereof within the State of California was and is an inseparable part of the use of said materials and each item thereof in interstate commerce.

IV

Pertinent Portions of the Act

The taxing act under which the tax complained of herein is claimed to arise, is an act of the State of California entitled:

"An act imposing an excise tax on the storage, use or other consumption in this State of tangible personal property, providing for the registration of retailers, providing for the levying, assessing, collecting, paying and disposing of such tax, making an appropriation for the administration hereof, prescribing penalties for violations of the provisions hereof and providing that this act shall take effect immediately."

Said act, Chapter 361 Statutes of 1935, was approved by the Governor of the State of California, June 20, 1935, and since said date has been and now is in full force and effect.

For convenience of the Court, a full, true and correct copy of said act is attached hereto and marked Exhibit "C".

Section 3 of said act provides:

"Sec. 3. An excise tax is hereby imposed on the storage, use or other consumption in this State of tangible personal property purchased from a retailer on or after July 1, 1935, for storage, use or other consumption in this State at the rate of three per cent of the sales price of such property. Every person storing, using or otherwise consuming in this State tangible personal property purchased from a retailer shall be liable for the tax imposed by this act, and the liability shall not be extinguished until the tax has been paid to this State; provided, however, that a receipt from a retailer maintaining a place of business in this State, given to the purchaser in accordance with the provisions of section 6 hereof, shall be sufficient to relieve the purchaser from further liability for the tax to which such receipt may refer; provided further, that the board may by rule and regulation provide that a receipt from a retailer who does [fol. 13] not maintain a place of business in this State shall also be sufficient to relieve the purchaser from further liability for the tax to which such receipt may refer."

By Section 2(a) "storage" is defined to mean and include any keeping or retention in this state for any purpose except sale in the regular course of business, of tangible personal property, purchased from a retailer; by Section 2(b) the term "use" is defined to mean and include the exercise of any right or power over tangible personal property incident to the ownership of that property, except that it shall not include the sale of that property in the regular course of business; by Section 2 (c) the term "purchase" is defined to mean any transfer, exchange or barter, conditional or otherwise, in any manner or by any means whatever, of tangible personal property, for a consideration; by Section 2(h) "tangible personal property" as used in said Act, is defined as personal property which may be seen, weighed, measured, felt, touched or is in any other manner, perceptible to the senses; by Section 2(i) the term "business" as used in said act, is defined to include any activity, engaged

in by any person, including a corporation, or caused to be engaged in by him or it with the object of gain, benefit or advantage; either direct or indirect; and by Section 2 (g) the term "Board" as used in said Act means the State Board of Equalization of the State of California.

Section 4 of said Act, so far as material to the questions herein presented, contains the following provisions to wit:

"Sec. 4. The storage, use or other consumption in this State of the following tangible personal property is hereby specifically exempted from the tax imposed by this act:

(a) Property, the gross receipts from the sale of which are required to be included in the measure of the tax imposed by Chapter 1020, Statutes of 1933 and any amendments made or which may be made thereto.

(b) Property, the storage, use or other consumption of which this State is prohibited from taxing under the Con- [fol. 14] stitution or laws of the United States of America or under the Constitution of this State."

The tax imposed by Chapter 1020, Statutes of 1933, of the State of California, referred to in Paragraph (a) of Section 4 of said Act, commonly known as the California Retail Sales Tax Act, is an act imposing a tax for the privilege of selling, renting or leasing tangible personal property within the State of California and the effect of the exemption provision contained in said paragraph (a) of said Section 4 is to make the said use tax applicable only to tangible personal property purchased in interstate transactions from retailers or sellers outside of the State of California.

Other provisions of the said Use Tax Act require that every retailer, selling tangible personal property for storage, use or other consumption in this state, shall register with the Board and give the name and address of all agents operating in this state, the location of any and all distribution or sales houses or offices, or other places of business in this state, and such other information as the Board shall require (sec. 5); and that every retailer, maintaining a place of business in this state and making sales of tangible personal property for storage, use or other consumption in this state, not exempted under the provisions of Section 4 of said act, shall, at the time of making such sales, collect the tax imposed by this act from the purchaser (Sec. 6); and

it is further provided that the tax imposed by said act shall be due and payable quarterly to the State Board of Equalization on or before the 15th day of the month next succeeding each quarterly period, the first quarterly period provided for in said Act, commencing with the first day of July, 1935 (Sec. 7). The second quarterly period of the current year ended June 30, 1936; and, according to the terms of said act, tax payments falling due under said Act [fol. 15] for said period will be due and payable July 15, 1936. Every retailer, maintaining a place of business in this state, is required by said Act (Sec. 7) to file with said Board on or before the 15th day of the month following the close of each quarterly period, a return for the preceding quarterly period in the form prescribed by the Board, showing the total sales price of the tangible personal property sold by the retailer during the preceding quarterly period, the storage, use or consumption of which is subject to the tax imposed by said Act and said retailer or seller is required to accompany said return by a remittance, payable to the State Board of Equalization, of the amount of tax therein required to be collected by the retailer during the period covered by such return, and every person storing, using or consuming tangible personal property, purchased from a retailer who does not maintain a place of business in the State of California or is not an authorized tax collector, is required, on or before the 15th day of the month following the close of each quarterly period, to file with the Board a return for the preceding quarterly period in the form prescribed by said Board, showing the total sales price of the tangible personal property purchased by him or it during such preceding quarterly period, the storage, use or consumption of which is subject to the tax imposed by said Act, and such other information as the Board may deem necessary for the proper administration of said Act, and it is required that such return shall be accompanied by a remittance of the amount of tax imposed by said Act during the period covered by such return. The Act further provides that, for the purpose of the proper administration thereof, and to prevent evasion of the tax and the duty to collect the same thereby imposed, it shall be presumed that tangible personal property sold by any person for delivery in this state, is sold for storage, use or other consumption in this state, unless the person selling such property shall have [fol. 16] taken from the purchaser a certificate signed by

and bearing the name and address of the purchaser to the effect that the property was purchased for resale. The said Act (Sec. 8) further provides for the imposition of a penalty of 10% plus interest at the rate of one-half of one per cent per month, or fraction thereof, from the date on which the tax or the amount of the tax required by said Act to be collected and paid, became due and payable to the state, for the failure to pay any such tax to the state or for failure to make the return of said tax as required by said Act, and further provides (Sec. 18) that if the neglect or refusal to file a return as required by said Act and to pay said tax was due to fraud or an intent to evade said Act, or rules and regulations thereunder, a penalty of 25% of the amount required to be paid by any person or corporation liable for such tax shall be added, plus interest, as therein provided. It is provided that all amounts determined by the said Board to be due on account of the failure or refusal of the person liable therefor, to return, and pay the same, shall become due and payable at the time of service of notice and provided that all taxes or amounts required by said Act to be collected and paid to the Board on the date when the same became due and payable, shall bear interest at the rate of one-half of one per cent per month, or fraction thereof, from and after the date when the same became due and payable until paid.

The said Use Tax Act contains the following provisions with reference to the enforcement thereof, to wit:

Collection Procedure; Lien of Tax

"Sect. 20. In any case in which any amount required to be paid to the State in accordance with the provisions of this act, is not paid when due the board may file in the office of the county clerk of Sacramento County, or any other county, a certificate specifying the amount required to be paid, interest and penalty due, the name and last known address of the retailer or other person liable for the same, that the board has complied with all the provisions of this act in [fol. 17] relation to the determination of the amount herein required to be paid and a request that judgment be entered against the retailer or other person in the amount herein required to be paid, together with interest and penalty as set forth in the certificate. The county clerk immediately upon the filing of such certificate shall enter a judgment for the people of the State of California against the retailer or

other person in the amount herein required to be paid, together with interest and penalty as set forth in this certificate. The judgment may be filed by the county clerk in a loose-leaf book entitled, 'Special Judgments for State Retail Sales or Use Tax.'" * * *

"If any retailer liable for an amount of tax herein required to be collected shall sell out his business or stock of goods or shall quit the business, he shall make a final return and payment within fifteen days after the date of selling or quitting business. His successor, successors or assigns, if any, shall be required to withhold sufficient of the purchase money to cover the amount of such taxes herein required to be collected and interest or penalties due and unpaid until such time as the former owner shall produce a receipt from the board showing that they have been paid, or a certificate stating that no amount is due. If the purchaser of a business or stock of goods shall fail to withhold purchase money as above provided, he shall be personally liable for the payment of the amount of taxes herein required to be collected by the former owner, interest and penalties accrued and unpaid by any former owner, owners or assignors.

"In the event that any person is delinquent in the payment of the amount herein required to be paid by him, the board may give notice of the amount of such delinquency by registered mail to all persons having in their possession, or under their control, any credits or other personal property belonging to such person, or owing any debts to such person at the time of the receipt by them of such notice and thereafter any person so notified shall neither transfer nor make any other disposition of such credits, other personal property, or debts until the board shall have consented to a transfer or disposition, or until twenty days shall have elapsed from and after the receipt of such notice. All persons so notified must, within five days after receipt of such notice advise the board of any and all such credits, other personal property or debts, in their possession, under their control or owing by them, as the case may be.

"At any time within three years after any person is delinquent in the payment of any amount herein required to be paid, the board may proceed forthwith to collect such amount in the following manner: The board shall seize any property, real or personal, of such person and thereafter

sell at public auction such property so seized, or a sufficient portion thereof, to pay the amount due hereunder, together with any interest or penalties imposed hereby for such delinquency, and any and all costs that may have been incurred on account of such seizure and sale. Notice of such intended sale and the time and place thereof, shall be given to such delinquent person in writing at least ten days before the date set for such sale by enclosing such notice in an envelope addressed to such person at his last known address or place of business, if any, and depositing the same in the [fol. 18] United States mail, postage prepaid, and by publication for at least ten days before the date set for such sale in a newspaper of general circulation published in the county or city and county in which the property seized is to be sold; provided that if there be no newspaper of general circulation in such county or city and county, then by the posting of such notice in three public places in such county or city and county ten days prior to the date set for such sale. The said notice shall contain a description of the property to be sold, together with a statement of the amount due, including interest, penalties and costs, if any, the name of the person from whom due, and the further statement that unless the amount due, interest and penalties and costs are paid on or before the time fixed in said notice for such sale, said property, or so much thereof as may be necessary, will be sold in accordance with law and said notice.

"At any such sale, the property shall be sold by the board in accordance with law and said notice, and the board shall deliver to the purchaser a bill of sale for the personal property, and a deed for any real property so sold, and such bill of sale or deed shall vest the interest or title of the retailer or other person liable for the tax in the purchaser. The unsold portion of any property so seized may be left at the place of sale at the risk of the retailer or other person liable for the tax. If upon any such sale, the moneys so received shall exceed the total of all amounts including interest, penalties and costs due the State, any such excess shall be returned to the retailer, or other person liable for the tax, and his receipt therefor obtained; provided, however, that if any person having an interest or lien upon the property, has filed with the board prior to any such sale notice of such interest or lien the board shall withhold any such excess

pending a determination of the rights of the respective parties thereto by a court of competent jurisdiction. If, for any reason, the receipt of such retailer or other person liable for the tax shall not be available, the board shall deposit such excess moneys with the State Treasurer, as trustee for such owner, subject to the order of such retailer or other person liable for the tax, his heirs, successors or assigns.

"It is expressly provided that the foregoing remedies of the State shall be cumulative and that no action taken by the board or Attorney General shall be construed to be an election on the part of the State or any of its officers to pursue any remedy hereunder to the exclusion of any other remedy for which provision is made in this act."

Arbitrary Assessments against Consumers

"Sec. 21. If any person storing, using, or otherwise consuming in this State tangible personal property purchased from a retailer maintaining a place of business in this State neglects or refuses to pay the tax imposed by this act, the board shall make an estimate based upon any information in its possession or that may come into its possession of the sales price of the property and on the basis of said estimated sales price compute and assess the tax payable by such person, adding to the sum thus arrived at a penalty equal to ten per cent thereof. All such assessments shall bear interest at the rate of one-half of one per cent per month, or fraction thereof, from the fifteenth day after the [fol. 19] close of the period or periods, as the case may be, for which the amount of tax should have been paid to the State until the date of payment. Promptly thereafter the board shall give written notice to such person of such estimate, tax and penalty, the notice to be served personally or by mail in the manner prescribed by the provisions of section 1013 of the Code of Civil Procedure."

In addition to the penalties hereinbefore referred to, the Act contains the following penalty provisions:

"Sec. 30. Any retailer or other person failing or refusing to furnish any return hereby required to be made, or failing or refusing to furnish a supplemental return or other data required by the board, or rendering a false or fraudulent return, shall be guilty of a misdemeanor and subject

to a fine of not exceeding five hundred dollars ($500) for each such offense.

Any person required to make, render, sign or verify any report as aforesaid, who makes any false or fraudulent return, with intent to defeat or evade the assessment or determination of amount due required by law to be made, shall be guilty of a misdemeanor, and shall for each such offense be fined not less than three hundred dollars ($300) and not more than five thousand dollars ($5000) or be imprisoned not exceeding one year in the county jail or be subject to both said fine and imprisonment in the discretion of the court.

Sec. 31. Any violation of the provisions of this act, except as otherwise herein provided, shall be a misdemeanor and punishable as such."

It is provided by said Act (Sec. 25) that the State Board of Equalization shall have the power to make tax assessments, to make determination of the amount of taxes, penalties and interest due, to make and prescribe rules and regulations relating to the administration and the enforcement of the provisions of the said Act and the said Board is charged with the enforcement of the provisions thereof.

The Attorney General of the State of California is the chief legal representative and attorney for said State and for said Board and, under the Constitution and laws of said State, there is vested in him the power and imposed upon him the duty to represent the State in the commencement and prosecution and/or to direct the institution and prosecution of suits for taxes or penalties due to the State of [fol. 20] California and generally to represent the State as its attorney at law in the collection of taxes or other indebtedness due the State of California or to prosecute persons liable to penalties provided for in tax statutes including the said Use Tax Act of 1935, and it is expressly provided by said Act (Sec. 28) that at any time within three years after any amount required thereby to be collected has become due and payable, and any time within three years after the delinquency of any tax, the Board may bring an action in the courts of this State or any other state, or any court of the United States in the name of the People of California, to collect the amount delinquent, together with penalties

and interest, and that the Attorney General must prosecute such action.

The said Act contains the following provisions with reference to the distribution of taxes, interest and penalties collected and to be collected thereunder:

"Sec. 27. All fees, taxes, interest and penalties imposed and all amounts of tax herein required to be paid to the State under this act must be paid to the board in the form of remittances payable to the State Board of Equalization of the State of California, and said Board shall transmit such payments to the State Treasurer to be deposited in the State treasury to the credit of the retail sales tax fund.

There is hereby appropriated, in addition to any other moneys appropriated, the sum of one hundred forty-one thousand five hundred dollars out of the "retail sales tax fund;" of such amount one hundred thousand dollars may be expended by the Board of Equalization, twenty-five thousand dollars may be expended by the Controller, ten thousand dollars may be expended by the State Department of Finance and six thousand five hundred dollars may be expended by the State Treasurer. The balance of the moneys paid under this act and deposited in the retail sales tax fund shall, upon order of the State Controller, be drawn therefrom for the purpose of making refunds hereunder or be transferred to the general fund of the State."

The said Act contains provisions relating to reassessments, redetermination of taxes paid, and refunds for erroneous or illegal payments, and expressly provides by the [fol. 21] terms of Section 29 thereof as follows:

"No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding in any court against this State or against any officer thereof to prevent or enjoin under this act the collection of any tax or any amount of tax herein required to be collected, but after payment of any such tax or any such amount of tax herein required to be collected under protest, duly verified and setting forth the grounds of objection to the legality thereof, the retailer or person making the payment may bring an action against the State Treasurer in a court of competent jurisdiction in the county of Sacramento for the recovery of the amount paid under protest. No such action may be instituted more than sixty days after the tax

or the amount herein required to be collected and paid to the State becomes due and payable, and failure to bring suit within said sixty days shall constitute waiver of any and all demands against the State on account of alleged overpayments hereunder. No grounds of illegality shall be considered by the court other than those set forth in the protest filed at the time of the payment of the tax or the amount herein required to be collected and paid to the State. If in any such action judgment is rendered for the plaintiff, the amount of the judgment shall first be credited on any taxes or amounts due from the plaintiff under this act, and the balance of the judgment shall be refunded to the plaintiff. In any such judgment, interest shall be allowed at the rate of six per cent per annum upon the amount found to have been illegally collected from the date of payment of such amount to the date of allowance of credit on account of such judgment or to a date preceding the date of the refund warrant by not more than thirty days, such date to be determined by the Controller.

"In no case shall any judgment be rendered in favor of the plaintiff in any action brought against the State Treasurer to recover any amount paid hereunder, when such action is brought by or in the name of an assignee of the retailer or other person paying said amount, or by any person other than the person who has paid such amount."

V

Pertinent Rulings of Defendant

Said Use Tax Act of 1935 and the tax imposed thereby is not a bona fide revenue measure. It is a measure intended to lay and which has the effect of laying, a burden upon interstate commerce and the privilege of doing business in interstate commerce but denying to the plaintiff the right to exercise the usual incidents of ownership and of operating a railroad in interstate transportation, namely, the right to use tangible personal property purchased outside of the State of California, unless this plaintiff pays to de- [fol. 22] fendants and the State of California, a tax equal to the sales tax of the State of California. On September 5, 1935, by a resolution of the defendants comprising said State Board of Equalization, which resolution plaintiff is

informed and believes and therefore alleges has not been rescinded, said Board promulgated the following ruling:

"Whereas, question has arisen with respect to the application of the Use Tax Act of 1935 to the consumption of newsprint imported into California for use in the publication of local newspapers, and

Whereas, no newsprint whatever is manufactured in California, and less than 15 per cent thereof is manufactured within the United States, and such importation is not in competition with California industry, and

Whereas, recognition of the non-competitive character of transactions in newsprint, insofar as domestic trade is concerned, has been given by the United States Government in permitting the importation of newsprint into this country free of duty, and

Whereas, the journals of the 1935 session of the California Legislature, at which the Use Tax Act was passed, show that the object and intent of such Statute is to protect California industry from unfair outside competition not subject to the Retail Sales Tax Act of 1933, and

Whereas, the inclusion of the consumption of imported newsprint in the purview of the Use Tax Act is not required in the fulfillment of such object and intent, and

Whereas, it appears that great hardship would result upon those engaged in the publication of newspapers in California if the law should be interpreted as applying to their consumption of newsprint,

Now, Therefore, Be it Resolved by the State Board of Equalization that it is the view of this Board that the Use Tax Act of 1935 does not apply to the consumption of newsprint imported into this State in interstate or foreign commerce for the use of publishers of California newspapers.

And be it Further Resolved that those required to make returns under said Use Tax Act need not include therein as taxable, any transactions involving the consumption of such newsprint.

And be it Further Resolved that the auditing staff of this Board be instructed to govern itself in conformity with this resolution and not to report as taxable under said Act any such newsprint transactions."

Said resolution declares the purpose, nature and effect of said Use Tax Act; and that the tax imposed upon plaintiff

[fol. 23] thereunder by defendants, discriminates against plaintiff in that the same does not apply equally to all persons introducing tangible personal property into the State of California, for use therein, but is applied by said defendants only to items and articles of tangible personal property which, in the opinion of the defendants, compete with products of California manufacturers or producers. The application and operation of said tax as applied by said defendants to this plaintiff, constitutes an unreasonable and undue discrimination against this plaintiff and works great hardship upon this plaintiff and will continue to do so unless restrained by this court as prayed for herein; that the greater proportions of the items purchased by plaintiff during said second quarter period and to be hereafter purchased, upon which items defendants claim plaintiff is obligated to pay said tax, are not manufactured or produced in California and are not and were not during such second quarterly period competitive with California industries, particularly track materials, car and locomotive parts, numerous manufactured steel products, timber, sheet steel, steel tires, car heating parts, pile driver parts, locomotive journal grease, steel tubing, and numerous items manufactured especially for railroad uses.

The said State Board of Equalization did on the first day of July, 1935, promulgate and adopt Rule 11, pursuant to the terms of the California Use Tax Act of 1935, which provides as follows:

"Property Sold or Used in Interstate Commerce

The fact that tangible personal property is purchased in interstate or foreign commerce does not exempt from the tax the storage, use or other consumption of such property in this State after the shipment of the property in interstate or foreign commerce has ended.

The fact that tangible personal property is used in interstate or foreign commerce following its storage in this State does not exempt the storage of the property from the tax. Property is deemed to be stored in this State if held in this State for any period of time whatever following the delivery [fol. 24] of the property to the purchaser or the termination of the interstate or foreign shipment of the property to the purchaser."

That under the construction placed upon said Ruling 11, said defendants assert the right and threaten to exact and collect from said plaintiff, a tax upon said materials and items and each one thereof as hereinbefore specifically set forth, and unless restrained, enjoined and prohibited by an order of this court, will demand and exact from said plaintiff, the taxes provided under said Act, upon said materials and items and each one thereof.

VI

Claim for Taxes Due and Threat of Prosecution by Defendants

Under said Act, said defendants and each of them claim that there is due and payable by said plaintiff, taxes on all plaintiff's purchases of tangible personal property specifically described in plaintiff's Exhibits "A" and "B" hereunto attached, for its uses in conducting interstate transportation as hereinbefore specifically set forth and demand payment thereof, and if the plaintiff should fail or refuse to pay such taxes so demanded, said defendants and each of them, intend and directly and expressly threaten to, and unless restrained by the judgment or order of this court will, in pursuance of their said expressed intention, institute and cause to be instituted summary suits or other proceedings to compel the said payment of said tax, interest and penalties provided by said Act.

Defendants, and each of them, further threaten, in accordance with the procedure laid down in said Act, to cause summary process to be issued for the seizure and sale of personal property of plaintiff used by plaintiff as instrumentalities of interstate commerce in the necessary operation, maintenance and repair of said railroad, and thereby plaintiff's said business will be interfered with and the [fol. 25] operation of its railroad will be interfered with to its great and irreparable damage in the sum of more than $40,000, and for which plaintiff has no adequate remedy at law; and defendants and each of them threaten to and will bring repeated suits against plaintiff for further quarterly installments of said tax and subject plaintiff to a multiplicity if suits and harassing litigation to plaintiff's great and irreparable damage.

VII

Irreparable Loss and Expense

The payment of said taxes would require plaintiff to pay to the State Board of Equalization on or before July 15, 1936, the several large amounts of tax payment hereinbefore stated and to suffer the loss of use of such money and the earning value thereof until recovered by suit, if recoverable at all, and in order to comply with the requirements of the said taxing act and the demands of said defendants it is necessary for the plaintiff to incur substantial expenses in tax accounting and in keeping records of information concerning its purchases and the uses of such properties necessary to defend its rights against the imposition of such taxes and that it will be necessary to continue such accounting unless it is relieved from the necessity so to do and to pay such taxes by the injunction sought in this proceeding, and such expenses and the damages aforesaid, if so incurred, will constitute a substantial and irreparable loss to the plaintiff.

VIII

The Effect of Said Tax

The imposition of said taxes upon plaintiff, as hereinbefore alleged, under the said Act, as the same is, and has been [fol. 26] construed and applied by the said defendants and each of them, is in violation of Article I, Section 8, Clause 3, of the Constitution of the United States and Article I, Section 3, of the Constitution of the State of California and said tax constitutes a direct burden on interstate and foreign commerce contrary to and in violation of the provisions of Article I, Section 8, Clause 3, and Article I, Section 10, Clause 2, of the Constitution of the United States and is a taking of plaintiff's property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States and Article I, Sections 3 and 13 of the Constitution of the State of California.

IX

Lack of Adequate Remedy at Law

Plaintiff is without a plain, speedy and adequate remedy at law in this or any other court of the United States or of

the State of California, and alleges that its remedy at law in the premises is inadequate in the following particulars:

(a) The only remedial procedure prescribed by said Act for the recovery of taxes paid or which may be paid by the plaintiff under said Act is to make payment of such taxes under protest and bring an action for the recovery thereof within a short period of limitation, to wit: 60 days following the payment thereof, against the State Treasurer of the State of California, in a court of competent jurisdiction in the County of Sacramento, for the recovery of the amount of taxes paid under protest; that a court of competent jurisdiction in the County of Sacramento, as plaintiff believes, is a state court of competent jurisdiction, being the Superior Court of said county; that such provision of the Act is not intended to provide for an action in a federal court, and that the term "a court of competent jurisdiction in the County of Sacramento", is not descriptive of the federal court, [fol. 27] although including within its jurisdiction the said county; and that such provision is so uncertain and indefinite that it fails to provide plainly and unequivocally a remedy at law, available to the plaintiff in the federal court, and that such question is undetermined either by decision of the state courts or federal courts.

(b) The statutory remedy at law prescribed by said Act is inadequate and incomplete in that the provisions of said Section 29, as hereinbefore quoted, show that in the action prescribed thereby for recovery of tax payments made under protest, interest may or shall be allowed, upon judgment for the plaintiff, upon the payment found to have been illegally collected, from the date of payment of such amount to the date of allowance of credit on account of such judgment or to a date preceding the date of the refund warrant by not more than 30 days, such date to be determined by the State Controller, and according to said provision, the said law fails to provide for the payment of interest for the full and complete period during which the taxpayer would be without the use of the amount of tax money so paid under protest for such time within 30 days as may be arbitrarily determined by the Controller, which lack of interest payment may extend for a longer period upon any failure to deliver such warrant to the taxpayer upon the date of its issue, and that the provisions of said statute for the pay-

ment of interest on account of the wrongful collection of such tax is indefinite and uncertain; and the said law furthermore does not provide a plain and adequate remedy at law because of the failure of said provision to state whether interest shall be allowed from the date of payment of such taxes to and collection by the retailer from the purchaser or whether interest shall run and be paid only from the date of the payment of the taxes to the State Board of Equalization, and in that respect the said remedy is not plain, certain or adequate.

[fol. 28] (c) The remedy at law which is prescribed by said Act, and particularly Section 29 thereof, is uncertain and does not provide a plain and adequate remedy at law because the same does not plainly state how and by whom payment of such taxes under protest shall be made, whether such protest shall be made by the purchaser contemporaneously with his payment of such tax to a retailer, or whether the same must be made by the retailer contemporaneously with the return and payment of such tax so collected by him to the State Board of Equalization; that a protest to be made contemporaneously with payment by the purchaser so as to avoid a waiver of right of protest or to avoid voluntary payment of such tax would necessitate a great multiplicity of protests on the part of the plaintiff in that plaintiff would be required to draw up, in legal and sufficient form, a protest stating the grounds for such protest for each and every tax payment made to any such retailer, and to deliver such protest to the retailer, at such place as such retailer might reside or have his place of business, or in the event of failure so to do, according to the provisions of said law, plaintiff would waive his right to assert the illegality of said law or to assert any grounds of illegality not sufficiently set forth in a protest duly filed at the time of the payment of the tax; and that the time when the purchaser or plaintiff would actually pay its tax, when payable to the retailer, would be the time when the same was paid to the retailer and not the time when the retailer made his return and payment of the tax to the State as a tax collector for the state. Such a procedure is and would be involved and complicated, involving a great multiplicity of protests with the attendant expense and accounting detail, and would involve expense for the employment of an attorney qualified to prepare such protests and would involve

expenses of a character not recoverable under the legal remedy provided for in said Act; and that said Act and the said Section 29 thereof, in said respects, fails to provide a [fol. 29] plain, speedy and adequate remedy at law, and that the procedure in the respects aforesaid has not been construed by the Supreme Court of the State of California.

(d) Taking into consideration the great multitude of purchases made and which will continue to be made by the plaintiff in connection with the operation of said railroad, a substantial expense in accounting, protesting and recovering by means of the prescribed statutory procedure as laid down in said Act would be involved in keeping accounts and making the calculation and claims for interest, running from the several dates of each of its numerous purchases to the time of refunds of such taxes, penalties and interest thereon, in the event of judgments for recovery thereof by the plaintiff, and such expenses would not be recoverable under the terms of said statute and would constitute an irreparable loss in a substantial amount.

(e) The statutory remedy at law prescribed by said Act is indefinite and uncertain and does not provide a plain and adequate remedy for the recovery of such taxes in that said Act fails to plainly prescribe whether the tax so paid under protest may be recovered only by the person making the payment directly to the State Board of Equalization, that is to say, the retailer, when he makes the payment to the Board, or the purchaser, when making direct payment under a consumer's return, and in that respect the said statute has not been construed by the Supreme Court of the State of California.

(f) The said statute is further uncertain in its provision relating to the rendition of judgment, to wit: the concluding paragraph of Section 29 provides that in no case shall any judgment be rendered in favor of the plaintiff in any action brought against the State Treasurer to recover any amount paid under the Act, when such action is brought by or in the [fol. 30] name of an assignee or retailer, or other person paying such amount, or by any person other than the person who has paid such amount, the said provision failing to state whether it has reference to the person making direct payment to the said Board, and in this respect the said Act has not been construed by the Supreme Court of the State of California.

(g) Plaintiff further alleges that Section 27 of said Act, hereinbefore quoted, requires such taxes, when collected, to be deposited in the State Treasury to the credit of the retail sales tax fund (not use tax fund) and contains provision for an appropriation for specified purposes and provides that all fees, taxes, interest and penalties collected under said Act in excess of said appropriation for specified purposes shall, upon order of the State Controller, be drawn therefrom for the purpose of making refunds under said Act, or be transferred to the general fund of the State; and plaintiff is informed and believes, and therefore alleges, that excepting the amount so appropriated for specified purposes, the amounts drawn for the purpose of making current refunds which are or have become due or payable, all taxes, penalties and interest so collected, are transferred and paid to the general fund of the state; that Section 29 of said Act provides for the satisfaction of judgment but does not authorize any of the defendants or the State Treasurer of the State of California, to pay such judgments, nor is there any express provision in said Act requiring the State Controller to pay the same; and no definite procedure is laid down by said Act for the payment, collection or enforcement of any judgment for the recovery of such taxes against the State Treasurer, or against the State of California, or against the State Board of Equalization; that said Act does not clearly provide an appropriation for the payment of any such judgment nor does it appear that the court's judgment is or shall be final authority for the payment of such judg-
[fol. 31] ment, but under the language of said statutes, refunds, if refunds embrace judgments, can only be made upon order of the State Controller which obviously contemplates a further and separate proceeding to secure his order rather than that the judgment itself shall be authority for the payment thereof, and in these respects, plaintiff's remedy at law is uncertain, indefinite, incomplete and inadequate.

(g) The remedy at law prescribed in said Act, or any remedy at law available to the plaintiff under the prohibition and limitation of said statute, would necessarily involve a multiplicity of actions because the only remedy available to the plaintiff is the remedy specified in said act by making each tax payment under protest and bringing suit within a short limitation period of 60 days against the State Treasurer of the State of California to recover such tax; that litigation to finally determine plaintiff's tax liability in the

premises would, according to plaintiff's experience and by the common experience in like litigation, known to the court, in all probability involve a period of time of one to two years or possibly a longer period should such litigation require final decision by the Supreme Court of the United States, which plaintiff believes would be likely, and that in the meantime, plaintiff would be required to make great multitudes of protests and to bring numerous suits at law, within 60 days after each tax payment date, and that such multiplicity of suits would involve the plaintiff in much expense, annoyance and injury which would be irreparable and thereby deny to the plaintiff a plain, speedy and adequate remedy at law.

X

Plaintiff is ready, able and willing to furnish a sufficient bond to be approved by this Court in such amount and upon such terms and conditions as may be required by this [fol. 32] Court as a condition for the issuance of any temporary restraining order or interlocutory injunction which may be granted herein.

Prayer for Relief

Wherefore, in consideration of all of the foregoing, and for as much as the plaintiff is remediless in the premises according to either the laws of the State of California or of the United States, or under the common law and remediable only in equity in this Honorable Court, plaintiff prays as follows:

1. That upon the filing of this complaint and upon the making and filing by plaintiff of a good and sufficient bond, in the form and amount approved by this Honorable Court, that there be issued forthwith, an order restraining, for the period allowed by law and pending the hearing of plaintiff's motion for interlocutory injunction, the defendants, and each of them and all persons acting under their direction or under the direction of either of them, from enforcing, proceeding to enforce or taking any measures to enforce the said California Use Tax Act of 1935, Chapter 361, Statutes of 1935 of the State of California, insofar as the defendants and each of them may apply or attempt to apply the same to the taxation of tangible personal property purchased and to be purchased by this plaintiff, as aforesaid, from points outside of the State of California and brought into said state for

storage, use or other consumption within said state by this plaintiff in operating its interstate railroad and railroad facilities aforesaid, and in conducting interstate transportation as an interstate carrier by railroad, either within or without the State of California, and that said defendants and each of them, their agents, servants and employees, and all persons acting or claiming to act under their direction or under the direction of either of them, be restrained and enjoined from imposing or collecting on account thereof, any alleged taxes, penalties or interest thereon, or from commencing any [fol. 33] prosecution or summary process against the plaintiff on account thereof, or from setting up, assessing or claiming or proceeding to set up, assess or claim, any such alleged taxes, penalties, interest, claims or demands under said law.

2. To the end that plaintiff may be protected in its business and property and saved from the hereinbefore described heavy statutory penalties and may not be subjected to a multiplicity of suits which will otherwise result, and may not suffer great and irreparable injury, loss and damage, and may be permitted to pursue and carry on its said business without unlawful hindrance and obstructions, and that its property may not be subjected to illegal liens and clouds, plaintiff prays that writs of subpoena in equity issue forthwith to the defendants to this bill, and to each of them, in their respective official capacities, to appear, make and file their answer to this bill, but not under oath, answer under oath being hereby expressly waived; and that, upon due notice thereafter, hearing and determination shall be had herein by three judges of this Honorable Court, one of whom shall be a Circuit Judge, as provided by law, or as provided by Section 380 of the U. S. Code, Ann. (Judicial Code Article 266, amended), and thereafter, that plaintiff have an interlocutory injunction against the said defendants and each of them, their agents, servants and employees, and against all persons acting or claiming to act under their direction, or under the direction of either of them, from proceeding to enforce said California Use Tax Act of 1935, Chapter 361, Statutes of 1935, of the State of California, insofar as the defendants or any of them may claim that the same applies to the taxation of tangible personal property purchased, and to be purchased, by plaintiff herein as aforesaid, from points outside of the State of California, and brought into said state for storage, use or other consumption [fol. 34] in this State by plaintiff in its business in operat-

ing an interstate railroad as aforesaid, and in conducting interstate transportation as an interstate carrier by railroad, either within or without the State of California, and that said defendants, and each of them, their agents, servants and employees, and any and all persons claiming or purporting to act in behalf of any of them or each of them, be restrained and enjoined from imposing or collecting on account thereof, any taxes, penalties or interest thereon, or from commencing any prosecution or suits, or issuing any summary process against the plaintiff on account thereof, or from proceeding or attempting to set up, assess or claim any such taxes, penalties or interest against this plaintiff, pending the final determination of plaintiff's prayer for a permanent injunction.

3. That upon the final hearing and determination upon the merits and the rendition of the final judgment herein by said statutory court of three judges as provided in said Section 380 of the U. S. Code, Ann., (Judicial Code, Article 266, amended), such Honorable Court order, adjudge and decree that the said California Use Tax Act of 1935, Chapter 361, Statutes of 1935, of the State of California, insofar as the same may, by the defendants, be claimed to be applicable to the taxation of tangible personal property, purchased and to be purchased by this plaintiff from points outside of the State of California, and brought into said state for storage, use or other consumption in this state by the plaintiff in the operation of its interstate railroad and in conducting interstate transportation as an interstate carrier, by railroad, either within or without the State of California, all as hereinbefore related in this bill of complaint, imposes a direct burden on interstate and foreign commerce contrary to and in violation of the provisions of Article I, Section 8, Clause 3, and Article I, Section 10, Clause 2, of the Constitution of the United States, and that [fol. 35] the imposition and collection of any tax under said law against this plaintiff in the manner aforesaid, would effectuate a taking of plaintiff's property without due process of law, in violation of the 14th Amendment of the Constitution of the United States, and that plaintiff has no adequate remedy at law in the premises and is entitled to a permanent injunction, restraining the enforcement of said law in said respects, and that such Honorable Court further find that said law, in any attempted application, as hereinbefore alleged, by defendants, and each of them, against this plaintiff, be held null and void and of no effect, upon the

grounds, and for the reasons set out and alleged herein, and upon such other grounds and for such other reasons as to this Honorable Court may seem just and reasonable, and may, by this Honorable Court, be found to exist, and that a permanent injunction issue herein against said defendants, and each of them, their agents, servants and employees, and any or all persons acting, or claiming to act under their order or at their behest, restraining the enforcement and execution of all of said provisions of said California Use Tax Act of 1935, Chapter 361, Statutes of 1935, of the State of California, and any attempt to collect said taxes and penalties thereunder against this plaintiff in the manner aforesaid, and that plaintiff have such other or further relief in the premises as the nature and the circumstances of this case may require, and to such Honorable Court may seem meet, just and agreeable in equity.

Harry H. McElroy, 65 Market Street, San Francisco, California, Attorney for Plaintiff. Guy V. Shoup, 65 Market Street, San Francisco, California, Counsel.

[fol. 36] *Duly sworn to by Roy G. Hillebrand. Jurat omitted in printing.*

[fol. 37] EXHIBIT "A" TO BILL OF COMPLAINT

Southern Pacific Company, Pacific Lines

Track Material Purchased During 3 Months Ended June 30, 1936

Track Renewals and Repairs

Item	Point of Origin		Total Purchased
Bars, angle	Colorado		$12,597.50
Bolts, track	Colorado		140.73
Creepers, rail and washers	Pennsylvania		30,123.58
Frogs, steel blocks, etc.	Illinois		885.16
Joints, compromise	Ohio		116.59
Joints, Con't and washers	Pennsylvania		5,189.56
Locknuts, track	Illinois		369.72
Rail, steel	Alabama	$610,404.06	
" "	Colorado	36,976.58	
			647,380.64
Spikes, track	Pennsylvania		453.51
Ties, cross	Oregon		386.57
Ties, switch	"		7,822.17
Tongues, steel, manganese	Pennsylvania		208.95
Washers, track	Illinois	100.86	
" "	New Jersey	1,265.70	
" "	New York	932.02	
			2,298.58
Total Taxable Purchase Price			$707,973.26
Tax—3% of Total			$21,239.20

(Issued by Accounting Department, San Francisco, California, July 7, 1936.)

[fol. 38] EXHIBIT "B" TO BILL OF COMPLAINT

Southern Pacific Company, Pacific Lines

Materials and Supplies and Other Tangible Personal Property (Other Than Track Material) Purchased During 3 Months Ended June 30, 1936

Sacramento Foundries—Supplies

Item	Point of Origin	Total Purchased
Coke	Alabama	$5,354.27
Iron, pig	Utah	4,738.29
Pyrometer parts	Michigan	117.41
Stoppers, graphite	New Jersey	113.69
Syrup, corn	Illinois	978.94
Total Taxable Purchase Price		$11,302.60

Maintenance of Freight, Passenger Cars, Locomotives, and Work Equipment

Item	Point of Origin		Total Purchased
Air brake, parts	New Jersey	$124.35	
" " "	Pennsylvania	10,352.65	
			$10,477.00
American Crane, parts	Minnesota		138.40
Appliances, miscellaneous	Maryland	1,080.55	
" "	Missouri	1,334.11	
" "	Pennsylvania	3,352.28	
			5,766.94
Asbestos	Illinois		500.50
Axles driving	Pennsylvania		3,966.23
Belts, axle lighting	Ohio		2,053.38
Blooms, steel	Pennsylvania		2,774.65
Bolts and Nuts	Illinois	4,582.24	
" "	Louisiana	116.52	
" "	Minnesota	131.87	
" "	New York	209.07	
" "	Ohio	177.09	
" "	Pennsylvania	16,762.89	
			21,979.68
Bolts, stay	"		4,305.62
Booster, parts	Maryland		1,078.70
Boxes, journal	Illinois		397.19
Brakes, hand H. P.	Illinois	245.27	
" " "	Wisconsin	403.97	
			649.24
Burners and lamps	Connecticut		104.12
Car heating, parts	Illinois		5,391.29
" " "	New York		449.28
Carried forward			$60,032.22

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Brought forward			$60,032.22
Car Lighting, parts	Connecticut	$293.47	
" " "	Illinois	1,264.83	
" " "	New Jersey	208.41	
" " "	Pennsylvania	173.37	
			$1,940.08
Carpet, Axminster	New York		643.28
Carbide	Michigan		3,750.00
Castings, miscellaneous	Illinois	237.66	
" "	Indiana	1,012.13	
" "	Iowa	748.00	
" "	Michigan	260.00	
" "	Pennsylvania	1,714.11	

Exhibit "B"—Southern Pacific Company, Pacific Lines—Continued

Item	Point of Origin		Total Purchased
Castings, miscellaneous	Washington	$147.05	
" "	Wisconsin	721.38	
			$4,840.33
Chain, steel	Wisconsin		144.86
Cloth, wire	Michigan		1,559.12
Conduit	Illinois		989.11
Copper, sheet	Connecticut	$585.46	
" "	Massachusetts	233.38	
" "	Ohio	317.80	
" "	Pennsylvania	269.29	
			1,405.93
Cord, Bell	Kentucky		635.13
Cotters	Missouri		567.97
Couplers	Pennsylvania		2,946.39
Coverings, seat	Massachusetts		109.89
Covers, head rest	North Carolina		852.00
Cylinder, R. H.	Michigan		145.00
Devices, retard	Massachusetts		105.00
Doors, steel trap	Illinois		100.94
Electrical, parts	Connecticut	440.37	
" "	Illinois	371.97	
" "	Indiana	135.48	
" "	New York	100.08	
" "	Ohio	125.47	
" "	Pennsylvania	2,740.04	
			3,913.41
Feed Water Heater Parts	Illinois	232.21	
" " " "	New Jersey	4,924.61	
			5,156.82
Ferrules, Copper flue	Connecticut	370.77	
" " "	New York	523.85	
			894.62
Carried forward			$90,732.10

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Brought forward			$90,732.10
Forgings, miscellaneous	Colorado	$750.72	
" "	Illinois	16,091.79	
" "	Indiana	1,901.04	
" "	Michigan	190.63	
" "	Minnesota	231.60	
" "	New York	315.13	
" "	Pennsylvania	233.08	
			$19,713.99
Fringe, Curtain	Indiana		659.75
Fuses, Plug	Illinois		123.72
Gaskets	Illinois	544.50	
"	Maryland	1,334.00	
"	Missouri	1,402.12	
			3,280.62
Glass, McBeth	Pennsylvania	1,633.50	
" "	Louisiana	2,906.10	
			4,539.60
Guards, Dust	Illinois		302.94
Headlight, parts	Illinois		2,973.04
Hose, air brake	New Jersey	1,167.06	
" " "	Ohio	3,018.64	
" steam	Pennsylvania	100.89	
			4,286.59

Exhibit "B"—Southern Pacific Company, Pacific Lines—Continued

Item	Point of Origin		Total Purchased
Injector, parts	New York		$4,459.30
Insulation, boiler	Illinois		150.75
Iron, bar	Pennsylvania	$107.62	
" "	Washington	475.31	
			582.93
" flyer	Pennsylvania		538.52
" stay bolt	New Jersey		12,654.85
Joints, McLaughlin	Maryland		946.75
Lamps, tail	New York		174.37
Locks, sash	Massachusetts		175.00
Lubricator, parts	New York	1,277.79	
" "	Ohio	142.06	
			1,419.85
Lumber, Hardwood	Arkansas	587.04	
" fir and pine	Oregon	82,901.38	
			83,488.42
Knuckles	Illinois	312.00	
"	Pennsylvania	155.63	
			467.63
Nails, Common wire	Maryland		2,905.66
Packing, metallic	New Jersey	152.41	
" "	New York	3,657.95	
			3,810.36
Paint, priming	Michigan		147.44
Carried forward			$238,534.18
[fol. 41]	Page No. 4		
Brought forward			$238,534.18
Panels, agosote	New Jersey	$296.35	
" "	Washington	531.11	
			827.46
Pantosote	New Jersey	1,865.65	
"	New York	1,473.52	
			3,339.17
Paper, sheathing	Oregon		8,145.46
Pile Driver, parts	Michigan	688.50	
" " "	Wisconsin	893.00	
			1,581.50
Pins, crank	Pennsylvania		2,415.94
" taper	Illinois		382.98
Plates and Sheets	Maryland		4,224.07
Plugs, porous	Pennsylvania		447.75
Pumps, cooling	Illinois		1,465.10
Regulators S–1050–E	Connecticut	1,927.50	
" "	Illinois	217.13	
			2,144.63
Rings, buil	Kansas		9,666.89
Rods, brass	Connecticut		458.54
" bronze welding	"		956.42
" piston	Pennsylvania		315.93
Safety Valve, parts	Connecticut		559.96
Separators, train battery	New York		235.20
Springs, coil	Nebraska		405.55
Steam Heat Regulator, parts	New Jersey		101.97
Steam shovel, parts	Minnesota		1,048.40
Steel, chromium	Pennsylvania	157.32	
" "	West Virginia	196.34	
			353.66
" sheet	Maryland	6,089.94	
" "	Pennsylvania	24,296.10	
			30,386.04

Exhibit "B"—Southern Pacific Company, Pacific Lines—Continued

Item	Point of Origin		Total Purchased
Steel, stainless	New Jersey	$136.53	
" "	Pennsylvania	111.34	
			$247.87
Tape, asbestos	Illinois		289.09
Taps, staybolt	Vermont		166.93
Tires, steel	Pennsylvania		14,942.32
Torches	"		105.25
Carried forward			$323,748.26

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Brought forward			$323,748.26
Tracks and Hangers, door	Indiana		1,284.28
Traps, steam	Michigan		127.85
Trays, smoker and cocktail	Indiana		2,593.15
Tubing, copper	Connecticut		905.36
" steel	Pennsylvania		8,995.18
Valves, gate	Wisconsin		167.48
" globe	Illinois	2,994.01	
" "	New York	737.05	
" "	Ohio	358.85	
" "	Pennsylvania	145.50	
			4,235.41
" pressure	Illinois		498.96
Washers, lock	New Jersey		159.11
" wrot	Wisconsin		847.15
Wheels, rolled steel	Pennsylvania		34,015.46
" tender	"		5,449.65
Wire, okocord	New Jersey		644.99
Total Taxable Purchase Price			$383,672.29

Lubricants and Waste for Locomotives and Cars

Item	Point of Origin		Total Purchased
Graphite	New Jersey	$132.85	
"	New York	267.85	
			$400.70
Grease, driving journal	Indiana		5,372.32
Oil, valve	Texas		10,245.68
Waste, Col. Cotton	Minnesota	6,170.06	
" " "	New York	2,552.00	
" " "	Wisconsin	2,066.03	
			10,788.09
Waste, journal box	Minnesota	7,197.30	
" " "	New Jersey	2,562.83	
" " "	Pennsylvania	138.24	
			9,898.37
Total Taxable Purchase Price			$36,705.16

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Maintenance of Signal, Telephone and Power Lines

Item	Point of Origin		Total Purchased
Batteries, storage	New Jersey	$3,948.41	
" "	New York	930.89	
			$4,879.30
Blocks, terminal	Illinois		197.29
Bonds, signal 15'	New Jersey		524.50

Exhibit "B"—Southern Pacific Company, Pacific Lines—Maintenance of Signal, Telephone and Power Lines—Continued

Item	Point of Origin		Total Purchased
Cable, tirex	Connecticut		$495.40
" underground	Massachusetts		162.24
Circuit Breaking, attachments	New York	$219.42	
" " "	Pennsylvania	166.23	
			385.65
Cells, Dry and Condulet	New Jersey	2,429.81	
" " " "	New York	3,246.21	
" " " "	Ohio	450.80	
			6,126.82
Controller, parts	Pennsylvania		359.10
Grids, battery	Michigan		1,044.75
Groups, positive	New York		352.00
Hose, rubber	Massachusetts		117.51
Joints, insulated	New York		6,111.79
Lamps, semaphore	Indiana		351.63
" signal	Pennsylvania		142.50
Light, rotating stop	Minnesota	1,601.95	
" " "	Pennsylvania	146.30	
			1,748.25
Motor Generator, set complete	Ohio		598.00
Pins, channel	Illinois		1,122.24
Plates, storage battery	New York		365.34
Posts, fibre end	Delaware		2,810.27
Receptacles, charging	Massachusetts	222.60	
" "	New York	2,263.15	
			2,485.75
Renewals, battery	New Jersey		12,827.90
Repeater and Parts	Illinois		270.72
Signals, highway crossing	Illinois		495.90
Telephones, dispatchers	Illinois		125.70
Terminals, wire	New York		376.19
Torches, emergency	Maryland		121.00
Carried forward			$44,597 74

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Brought forward			$44,597.74
Track signal, apparatus	Pennsylvania		270.75
Transformers	Illinois	1,415.90	
"	Missouri	408.08	
			1,823.98
Wire, bond	Louisiana	137.41	
" "	Maryland	2,164.43	
" "	New Jersey	251.58	
			2,553.42
" copper	Connecticut	4,014.48	
" "	New Jersey	12,173.13	
" "	New York	3,374.44	
" "	Pennsylvania	1,770.02	
" "	Rhode Island	1,046.10	
			22,378.17
" copper and cable	Connecticut	853.70	
" " " "	New Jersey	3,871.65	
			4,725.35
" galvanized	Maryland		181.29
" iron	Maryland	291.21	
" "	Pennsylvania	4,763.06	
" "	Rhode Island	524.55	
			5,578.82
Total Taxable Purchase Price			$82,109.52

Exhibit "B"—Southern Pacific Company, Pacific Lines—Continued

Maintenance and Replacement of Shop Machinery and Tools

Item	Point of Origin		Total Purchased
Axes	Pennsylvania		$200.88
Blades, hack saw	Michigan		353.50
Cards, resistance	Michigan		304.80
Chasers, bolt	Pennsylvania		181.44
Chisels	"		378.65
Chucks, scroll and parts	Connecticut	$110.38	
" " " "	Michigan	181.17	
" " " "	Pennsylvania	202.57	
			494.12
Compressor, parts	New Jersey		344.15
Controllers, electric	Ohio		160.00
Drills, twist	Michigan		1,013.99
Files	Pensylvania		2,092.06
Gauges, wheel and coupler	Connecticut		108.33
Gear draft minor	New York	4,130.18	
" " "	Pennsylvania	1,705.82	
			5,836.00
Carried forward			$11,467.92

[fol. 45]

Brought forward			$11,467.92
Generator, parts	Wisconsin		3,007.14
Grease Gun, parts	"		503.02
Guards, light globe	Indiana		135.48
Hammers	New Jersey		125.60
Hose, air tool	Pennsylvania		1,084.87
Jacks, journal	Pennsylvania		620.89
Lathe, parts	Illinois		325.00
Oil and Waste saving machine	New York		760.00
Oxygen	Indiana		117.27
Packing, searing	New Jersey		129.15
Pumping Jack, parts	"		182.70
Reamers	Michigan		103.96
Riveting Hammer, parts	"		248.24
Saws	Ohio		120.41
Expanders, tube	"		130.24
Steel, tool	Michigan	101.61	
" "	New York	205.68	
" "	Pennsylvania	1,994.04	
			2,301.33
Taps	Pennsylvania	236.45	
"	Vermont	124.37	
			360.82
Thor Drill, parts	Illinois		257.20
Vises	Rhode Island		126.13
Wheels, grinding	Massachusetts	1,481.87	
" "	New York	966.41	
			2,448.28
Wrenches	Connecticut	776.89	
"	New York	554.86	
			1,331.75
Total Taxable Purchase Price			$25,887.40

Exhibit "B"—Southern Pacific Company, Pacific Lines—Continued

fol. 46] Page No. 9

Stationery

Item	Point of Origin		Total Purchased
Stationery and blank forms	Illinois	$1,249.02	
	New Jersey	168.05	
	New York	138.13	
	Ohio	1,741.84	
	Oregon	1,727.00	
	Pennsylvania	512.40	
	Washington, D. C.	560.00	
	Wisconsin	1,916.17	
			$8,012.61
Total Taxable Purchase Price			$8,012.61

Track and Roadway Tools

Item	Point of Origin		Total Purchased
Bits, track drill	Illinois		$149.94
Bowl, cement mixer	New Jersey		110.00
Cars, section motor	Minnesota		413.60
Chisels, track	Ohio		1,646.40
Concretor, on wheels	Indiana		1,046.64
Discer, ballard	Wisconsin		323.37
Drills, shank	Michigan		108.91
Forks, ballard	Indiana		696.63
Jacks, track	Pennsylvania		297.00
Parts, compressor	New York		190.15
Parts, section motor car	Illinois	6,298.79	
	Michigan	2,207.78	
	Minnesota	6,017.75	
	Pennsylvania	891.10	
	Wisconsin	136.20	
			15,551.62
Picks, track	Kentucky		2,640.43
Saws, cross cut	Ohio		192.24
Shovels, track	West Virginia		282.73
Spark plugs	Ohio		693.66
Tape, measuring	Michigan		214.26
Total Taxable Purchase Price			$24,557.58

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Train, Station and Yard Supplies

Item	Point of Origin		Total Purchased
Briquets, charcoal	Michigan		$2,535.00
Brushes, car cleaning	Michigan		136.71
Bunting	New York	$152.89	
"	Virginia	352.19	
			505.08
Burners, signal lamp	Indiana		297.94
Clubs, brake	Kentucky		630.63
Cord, bell	Kentucky		176.24
Crayons	Missouri		103.88
Fuses and torpedoes	Indiana		12,870.00
Globes, lantern	New York		2,668.59
Heads, mop	Alabama		267.48
Hose, water	New Jersey		100.82
Lamps, table	Connecticut		101.66
" base	New Jersey		263.72

Exhibit "B"—Southern Pacific Company, Pacific Lines—Continued

Item	Point of Origin		Total Purchased
Lanterns, inspectors	New York		$301.35
Locks, switch	Indiana		714.34
Mantles, gas	Connecticut		503.05
Padlocks	Connecticut	$136.79	
"	Pennsylvania	574.40	
			711.19
Parts, train signal	Connecticut	276.58	
" " "	Pennsylvania	2,043.94	
			2,320.52
Seats, car	Illinois		2,415.50
Sponges	New York		266.54
Tissue, toilet	Oregon		1,337.65
Wheels, Baggage truck	Illinois		1,097.76
Total Taxable Purchase Price			$30,325.65

[fol. 48]

Exhibit "B"—Southern Pacific Company, Pacific Lines—Repair and Maintenance Material and Supplies for Bridges, Buildings Equipment and Water and Fuel Pumping Plants.

Page No. 11

Item	Point of Origin		Total Purchased
Burlap	Oregon		$473.66
Camera and fixtures	Illinois		1,961.96
Cloth, brass wire	Michigan		779.72
" iron wire	Ohio		452.42
" Jewels	Massachusetts		981.54
" steel	Ohio		226.55
Distillate	Wyoming		498.80
Extract, chestnut	North Carolina		2,435.40
Hose, water	New Jersey	$491.26	
" "	Pennsylvania	505.87	
			997.13
Iron, ingot	Pennsylvania		264.43
" ulster	New Jersey		141.01
Joints, expansion	Illinois		253.33
Leathers, pump cup	Pennsylvania		101.79
Lubricators, rail and flange	Illinois		4,999.87
Lumber, cedar	Oregon	4,052.90	
" "	Washington	195.23	
			4,248.13
" fir and pine	Oregon		62,081.11
Metal, expanded	Ohio		4,338.20
Piling	Oregon		4,980.35
Pipe, black iron	New Mexico	285.25	
" " "	Pennsylvania	1,585.98	
			1,871.23
" fittings	Illinois		969.27
Carried forward			$93,055.90

[fol. 49] Page No. 12

Brought forward			$93,055.90
Pipe, galvanized iron	Illinois		745.54
" stand	"		106.40
" steel	"	825.19	
" "	Pennsylvania	1,388.81	
			2,214.00

Exhibit "B"—Southern Pacific Company, Pacific Lines—Repair and Maintenance Material and Supplies for Bridges, Buildings Equipment and Water and Fuel Pumping Plants—Continued

Item	Point of Origin	Total Purchased
Preparakote	Michigan	$ 192.91
Press, single color	Ohio	4,702.50
Pump and parts	New Jersey	1,723.91
Pump, sump	Michigan	135.24
Shovels, round point	West Virginia	282.73
Spikes, boat	Oregon	176.40
Steel, bridge	Indiana	62,514.96
Stringers	Oregon	13,182.33
Ties, bridges	Oregon	472.65
Tires, rubber	Michigan	142.21
Valve, Chamber complete	Ohio	168.40
" flange and gate	Illinois	128.25
Washers	Illinois	1,320.96
Water column, parts	Illinois	121.85
Total Taxable Purchase Price		$181,387.14
Miscellaneous Material		
Material and Supplies Purchased in States Other than California in Lots of Less than $100.00 Each		98,257.41
Total Taxable Purchase Price		$98,257.41

[fol. 50]

Exhibit "B"—Southern Pacific Company, Pacific Lines—Recapitulation

Page No. 43

Sacramento Foundries—Supplies	$11,302.60
Maintenance of Freight and Passenger Car, Locomotives and Work Equipment	383,672.29
Lubricants and Waste for Locomotives and Cars	36,705.16
Maintenance of Signal, Telephone and Power Lines	82,109.52
Maintenance and Replacement of Shop Machinery and Tools	25,887.40
Stationery	8,012.61
Track and Roadway Tools	24,557.58
Train, Station and Yard Supplies	30,325.65
Repair and Maintenance Material and Supplies for Bridges, Buildings, Equipment and Water and Fuel Pumping Plants	181,387.14
Miscellaneous Minor Material and Supplies	98,257.41
Total Taxable Purchase Price	$882,217.36
Tax—3% of Total	$26,466.52

(Issued by Accounting Department
San Francisco, California, July 8, 1936)

[fols. 51-53] [File endorsement omitted.]

[fol. 54] IN UNITED STATES DISTRICT COURT

[Title omitted]

[fol. 55] MOTION FOR TEMPORARY RESTRAINING ORDER AND APPLICATION FOR HEARING FOR INTERLOCUTORY INJUNCTION —Filed July 10, 1936

Comes now the plaintiff, and upon its verified bill of complaint heretofore duly filed herein, files this, its motion,

pursuant to Section 380 of the U. S. Code Ann. (Judicial Code Article 266, amended), for the issuance of a temporary restraining order, upon the grounds and in the manner set forth in said bill of complaint, to prevent immediate, great and irreparable injury, loss and damage, which otherwise would result to the plaintiff, before the hearing and determination of the application for an interlocutory injunction herein may be had, or notice thereof, be served, particularly because of said plaintiff's statutory liability to pay, on or before the 15th day of July, 1936, the taxes alleged by defendants to be due from plaintiff under certain provisions of the California Use Tax Act of 1935, Chapter 361, Statutes of 1935, of the State of California, claimed herein to be unconstitutional, illegal and void; and because, in failing to so pay said taxes on or before said due date, said plaintiff would become immediately liable for the gross amount of said taxes and by way of statutory penalty for a sum in addition to said total amount of said taxes, equal to 10% thereof, and a further additional sum equal to one-half per cent thereof, calculated upon the total amount of said taxes from the day upon which said taxes become due and payable to the date of payment thereof, and said plaintiff further makes this its application to this court for a hearing on this cause for an interlocutory injunction, in accordance with the prayer of said bill of complaint and in accordance with Section 380 of the U. S. Code Ann., (Judicial Code Article 266, amended).

H. H. McElroy, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 56] In United States District Court

[Title omitted]

[fol. 57] Order Noticing Necessity for Other Judges, Issuing Temporary Restraining Orders and Order to Show Cause for Temporary Injunction—Filed July 10, 1936

The verified bill of complaint in the above entitled cause having been presented, and a bond conditioned in the sum of Fifty Thousand and no/100 ($50,000.00) Dollars, the amount

fixed by this court, having been executed and the same having been approved by the court as to form and sufficiency, said bill of complaint is hereby approved.

The constitutionality of an act of the Legislature of the State of California, is attacked in said bill of complaint, calling for the determination of whether or not an interlocutory injunction shall be issued and a court consisting of three United States judges, one of whom shall be a Circuit Judge, under Section 380, Title 28, U. S. Code Ann. (Judicial Code Article 266, amended) is required. The facts alleged in said bill of complaint show that immediate and irreparable injury, loss and damage will result to the plaintiff before notice can be served, and a hearing had thereon, it appearing to the court that the collection of the taxes sought to be enjoined herein are due and payable on or before the 15th day of July, 1936, and unless said taxes are paid on said day or the collection thereof be enjoined by a temporary restraining order, said plaintiff will be assessed a penalty of 10% of the amount of such taxes together with interest on said amount and that the enforcement of such penalties and interest would work an immediate, harsh and irreparable injury to the plaintiff. This restraining order is therefore granted without notice, under the provisions of Section 381, Title 28 of said U. S. Code Ann., (Judicial Code Article 266, amended).

The defendants, John C. Corbett, Fred E. Stewart, Richard E. Collins, Ray L. Edgar and Ray L. Riley, as members [fol. 58] of the State Board of Equalization of the State of California, State Board of Equalization of the State of California, and U. S. Webb, the Attorney General of the State of California, their assistants, agents and employees are hereby restrained from enforcing, proceeding to enforce, or taking any measures to enforce, the California Use Tax Act of 1935, Chapter 361 of the Statutes of 1935, of the State of California, insofar as the defendants and each of them may apply or attempt to apply the same to the taxation of tangible personal property purchased and to be purchased by plaintiff herein, from points outside of the State of California and brought into said state for storage, use or other consumption within said State by plaintiff in operating its interstate railroad and railroad facilities aforesaid, and in conducting interstate transportation as an interstate carrier by railroad, either within or without the State of California, and that said defendants and each of them, their

agents, servants and employees, and all persons acting or claiming to act under their direction or under the direction of either of them, be and they are hereby restrained and enjoined from imposing or collecting on account thereof, any alleged taxes, penalties or interest thereon, or from commencing any prosecution or summary process against the plaintiff on account thereof, or from setting up, assessing or claiming or proceeding to set up, assess or claim, any such taxes, penalties, interest, claims or demands under said law as in said bill of complaint specifically set forth.

Let the defendants and each of them show cause, before the court consisting of three judges as provided by said Section 380, Title 28, U. S. Code Ann. (Judicial Code, Article 266, amended) at San Francisco, California at the Court Room of said Court in the Postoffice Building, July 20, 1936, at ten o'clock A. M., if any they or either of them have, why [fol. 59] a temporary injunction should not issue as prayed for in the bill of complaint.

Let subpoenas issue directed to the defendants and each of them, requiring them to appear and answer, as provided by the statute.

Let a copy of the bill of complaint in the above cause and a copy of this order and a subpoena be served upon Honorable Frank F. Merriam, Governor of the State of California, and Honorable U. S. Webb, Attorney General of the State of California.

This order signed at San Francisco, California, on the 10th day of July, 1936, at four o'clock P. M.

(Sgd.) by Michael J. Roche, United States Judge.

[File endorsement omitted.]

[fol. 60] IN UNITED STATES DISTRICT COURT

RETURN ON SERVICE OF WRIT—Filed August 12, 1936

UNITED STATES OF AMERICA,
Northern District of California, ss:

I hereby certify and return that I served the annexed Subpoena in Equity on the therein-named Frank F. Merriam, Governor of the State of California, by handing to and leaving a true and correct copy thereof together with copy of

Complaint with Francis Cochran, Secretary to Governor Frank F. Merriam, personally, at Sacramento, California, in said District, on the 15th day of July, A. D., 1936.

George Vice, U. S. Marshal, by Hayden Saunders, Deputy.

[fol. 61] IN UNITED STATES DISTRICT COURT

RETURN ON SERVICE OF WRIT—Filed August 12, 1936

UNITED STATES OF AMERICA,
Northern District of California, ss:

I hereby certify and return that I served the annexed Order to Show Cause and Temporary Restraining Order on the therein-named Frank F. Merriam, Governor of the State of California, by handing to and leaving a true and correct copy thereof with Francis Cochran, Secretary to Governor Frank F. Merriam, personally, at Sacramento, California, in said District on the 15th day of July, A. D., 1936.

George Vice, U. S. Marshal, by Hayden Saunders, Deputy.

[File endorsement omitted.]

[fol. 62] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS BILL OF COMPLAIN—Filed April 7, 1937

Come Now the defendants in the above entitled cause and move the court to dismiss the plaintiff's bill of complaint on the following grounds:

[fol. 63]

I

That the bill of complaint is without equity and the jurisdiction of the Federal Court does not affirmatively appear upon the face of the bill.

II

That it does not appear that the plaintiff is without adequate remedy at law, and the statement to the contrary in

paragraph X of the bill of complaint is without foundation of law in view of Sec. 29 of the California Use Tax Act of 1935 providing for an action to recover such tax paid under protest.

III

That no question of public interest or necessity appears on the face of the bill and it does not appear that irreparable injury or damage will follow if the bill of injunction is not granted.

IV

That the said bill of complaint does not state facts sufficient to constitute a cause of action against defendants or either of them or to entitle plaintiff to the relief prayed for or to any relief.

Wherefore, defendants pray that the order of the court heretofore entered herein granting a temporary injunction be set aside; that said application for temporary injunction be denied and that said bill of complaint be dismissed.

Dated April 6, 1937.

U. S. Webb, Attorney General; H. H. Linney, Deputy Attorney General; James J. Arditto, Deputy Attorney General, Attorneys for Defendants.

[fol. 64] Affidavit of Service by Mail

State of California,
City and County of San Francisco, ss:

The undersigned, being duly sworn, says: I am a citizen of the United States, over the age of eighteen years, a resident of the City and County of San Francisco, State of California, and not a party to the above entitled action; Harry H. McElroy & Guy V. Shoup the attorneys of record of the above-named plaintiff maintain an office at 65 Market Street in San Francisco, County of San Francisco, State of California; and between said two places there is a regular communication by mail; on the 7th day of April, 1937, I served a true copy of the Motion to Dismiss Bill of Complaint; Memorandum of Points & Authorities and Notice herein, to the original of which this affidavit is attached, on said last-named attorneys of record, by depositing said copy on said date in the post office at the said City and County of

San Francisco, enclosed in a sealed envelope addressed to said attorneys at the office thereof, and prepaying the postage thereon.

Virginia Cooke.

Subscribed and sworn to before me, this 7th day of April, 1937. James J. Arditto, Deputy Attorney General.

[File endorsement omitted.]

[fol. 65] IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

In Equity. No. 4055-R

SOUTHERN PACIFIC COMPANY, a Corporation, Plaintiff,

v.

JOHN C. CORBETT, FRED E. STEWART, RICHARD E. COLLINS, Ray L. Edgar, and Ray L. Riley, as Members of the State Board of Equalization of the State of California; State Board of Equalization of the State of California, and U. S. Webb, the Attorney General of the State of California, Defendants

Before Denman, Circuit Judge, and St. Sure and Roche, District Judges

[fol. 66] OPINION—Filed September 10, 1937

DENMAN, Circuit Judge:

This case involves the question whether the necessary incidental storage of materials brought by an interstate railway company for installation in the service of repair and replacement under a predetermined plan for the maintenance and improvement of the service, is a use in interstate commerce. The State of California, under a general tax law applying to all persons storing within the state goods purchased without the state upon which goods no state sales tax has been paid, seeks to have included in the large number of persons subject to the statute those engaged in commerce among the states.

By the logically immediate process of federal law, the tax on these materials stored for current repairs, operation, etc., of the interstate railway is translated into the passenger fares and merchandise carriage rates of all the passengers and shippers of the thirty or forty states shipping into and out of California.[1] The persons interested in and affected by our decision, though not appearing here, are those upon whom the tax will certainly fall. Though not litigants, their interest transcends that of the corporation and its stockholders.

The Constitution gives to Congress the regulation of the management of interstate railways. If the court decides that this storage of materials is not a use in interstate commerce, then the Congress may not declare it to be or regulate it as such a use. If Congress desires to require the railways to keep in storage for current use such necessary materials it can do so only by invading intrastate activities under an [fol. 67] extension of the principles laid down in Nat. Labor Rel. Board v. Jones & Laughlin Steel Co., 81 L. ed. 563 and Edwards v. U. S. (C. C. A.-9) No. 8386, decided July 22, 1937. The delicate question of the boundary between state and federal power would seem to make proper the presence of the Attorney General of the United States, although the recent legislation requires the opportunity for his presence only where there is presented the constitutionality of a federal statute.[2]

This is a suit in equity brought before a court of three judges pursuant to section 266 of the Judicial Code[3] seeking to have enjoined pendente lite and permanently the enforcement of a statute of the State of California, namely the Use Tax Act of 1935.[4] The defendants are the California State Board of Equalization, the individual members of the board, and the Attorney General of the state. The injunctions are sought on the grounds that the enforcement of the tax in this case will unduly burden the plaintiff's interstate commerce business contrary to the provisions of Ar-

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[1] Taxes are, of course, taken into account in determining a carrier's operating expenses or property valuation for rate fixing purposes. See N. Y. etc., Ry., 97 I. C. C. 273; Great North R. Co., 133 I. C. C. 1.

[2] H. R. 2260, approved August 25, 1937.

[3] Act of June 18, 1910, 36 Stat. 557, 28 U. S. C. A. sec. 380.

[4] Cal. Stats., 1935, ch. 361.

ticle I, section 8, of the Federal Constitution, and that there exists for the plaintiff no adequate remedy at law.

A temporary restraining order against the enforcement of the tax has been issued. The matter is now before this court on the plaintiff's prayer for interlocutory injunction and the defendants' motion to dismiss the bill. In support [fol. 68] of their motion to dismiss the defendants contend that the plaintiff has an adequate remedy at law and that the bill states no ground of relief whatsoever.

Under the assailed tax measure, later considered in detail, the defendants seek to impose against the Southern Pacific Company an excise tax upon the "storage" or "use" of personal property purchased by the company without the State of California, shipped to points within the state and there held, in accordance with predetermined plans, to be installed and made an active part of the company's tangible equipment used within the state for purposes of its inextricably interwoven interstate and intrastate commerce.

The Southern Pacific Company is a corporation of Kentucky engaged as a common carrier by railroad in seven states, including California. Half of its more than 8,000 total mileage is in California. Its gross operating revenue for the calendar year 1935 was more than $124,000,000 of which $63,000,000 was earned on California business. Of this latter figure over $34,000,000 was attributable to interstate commerce.

The specific personal property against the use of which the excise is sought to be enforced consists of a great variety of material necessary for the conduct of plaintiff's intermingled interstate and intrastate business. A portion of it was purchased for integration in plaintiff's railroad system pursuant to an existing maintenance program for the year 1936. The remainder was acquired to have on hand for the recurring demands of maintenance and emergency requirements. Among other articles the property purchased included rails, frogs, switches, valve oil, lumber, [fol. 69] stationery and tools. The complaint alleges that the greater portion was specifically designed for use in the operation, maintenance and repair of the road, or "peculiarly adapted to railroad uses * * * and * * * not suitable for any other use." The articles were all required for the efficient and economical conduct of the road.

Concerning the interstate commerce purposes of these purchases, the complaint alleges:

"Said purchases were made by the plaintiff through the use of its operating capital consisting of money or current assets definitely devoted to the service of transportation, or through the credit of said plaintiff as a railroad engaged in the service of transportation and upon the purchase of said materials and the payment therefor, the expenses therefor are in due course charged into the operating expenses of said carrier to the appropriate accounts for operation, maintenance or repairs, according to the accounting rules and regulations prescribed for railroads engaged in interstate commerce under the provisions and requirements of the Interstate Commerce Act, and that all of said items of tangible personal property so purchased by the plaintiff were devoted to the service of transportation immediately upon their purchase and that upon the purchase of said articles they immediately became a necessary and indispensible part of working capital, material, supplies, equipment and instrumentalities for the operation of said railroad and the said articles and each and all of them became, were and are instrumentalities used indiscriminately and inseparably in the operation, maintenance and repair of plaintiff's railroad for conducting interstate transportation and intrastate transportation from the time the same were purchased therefor, and any storage, use or consumption thereof, which occurred within the State of California cannot be separated or segregated as between intrastate and interstate transportation, the said railroad contemporaneously carrying by means of the same organization and facilities, both intrastate and interstate commerce and said items and materials being from the time of purchase outside the State of California inextricably devoted to and used in service of both classes of commerce."

And further:

"* * * that prior to any keeping or retention of said materials within the State of California, said materials were allocated and dedicated to sole and exclusive use in interstate commerce and any keeping or retention thereof within the State of California was and is an inseparable part of the use of said materials and each item thereof in interstate commerce."

The gravamen of these allegations is thus perceived to be that any "keeping" or "storage" of the property within

[fol. 70] the state is a use of the property in interstate commerce preparatory to a subsequent use by way of actual physical consumption.

During the three months ending June 30, 1936, the property described in the complaint, purchased outside of and shipped into California, amounted to $1,590,190.62. The use tax assessed on this material totals $47,705.72.

The Act in question imposes an excise tax of three percent of the sale price upon the storage, use or other consumption of tangible personal property within the state.[5] Leaving out of account the alleged character of the properties as instrumentalities of interstate commerce, the plaintiff's exercise of uses incidental to ownership over them within the state comes within the broad definitions of the statute.[6]

[fol. 71] Exempt from the operation of the tax are materials protected from excise by the Federal or State Constitution, and material upon which the California three percent sales tax has been paid.[7] Thus it is observed that

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[5] Cal. Stats., 1935, ch. 361.

"Sec. 3. An excise tax is hereby imposed on the storage, use or other consumption in this State of tangible personal property purchased from a retailer on or after July 1, 1935, for storage, use or other consumption in this State at the rate of three per cent of the sales price of such property.

"Every person storing, using or otherwise consuming in this State tangible personal property purchased from a retailer shall be liable for the tax imposed by this act * * *."

[6] Sec. 2. * * *

"(a) 'Storage' means and includes any keeping or retention in this State for any purpose except sale in the regular course of business of tangible personal property purchased from a retailer.

"(b) 'Use' means and includes the exercise of any right or power over tangible personal property incident to the ownership of that property, except that it shall not include the sale of that property in the regular course of business."

* * * * * * *

[7] "Sec. 4. The storage, use or other consumption in this State of the following tangible personal property is hereby specifically exempted from the tax imposed by this act:

"(a) Property, the gross receipts from the sale of which are required to be included in the measure of the tax imposed

the use tax is complementary to the sales tax, being designed to reach purchasers who acquire personal property in other states.

If the property taxed is purchased from a retailer maintaining a place of business within the State of California, the purchaser pays the tax to the retailer and the latter pays it to the State Board of Equalization. If the retailer maintains no place of business within the state, the purchaser pays the board directly. In either case returns and payments are due quarterly (sections 6, 7).

In the event of non-payment the board may file with any county clerk a certificate showing due determination of the tax and the failure to pay. Upon such filing the county clerk is required to enter a judgment for the state against the delinquent. The judgment is subject to execution in the usual manner, and in addition it becomes a lien upon any real property owned by the delinquent within the county (section 20). In addition to this procedure, the board is em- [fol. 72] powered to bring an action in any court of competent jurisdiction to recover the tax at any time within three years after it becomes due (section 28).

The taxpayer is afforded but one remedy to recover taxes illegally exacted. He may pay under protest and bring an action in the state court.[8]

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by Chapter 1020, Statutes of 1933 and any amendments made or which may be made thereto.

"(b) Property, the storage, use or other consumption of which this State is prohibited from taxing under the Constitution or laws of the United States of America or under the Constitution of this State."

[8] "Sec. 29. No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding in any court against this State or against any officer thereof to prevent or enjoin under this act the collection of any tax or any amount of tax herein required to be collected; but after payment of any such tax or any such amount of tax herein required to be collected under protest, duly verified and setting forth the grounds of objection to the legality thereof, the retailer or person making the payment may bring an action against the State Treasurer in a court of competent jurisdiction in the county of Sacramento for the recovery of the amount paid under protest. No such action may be instituted more than sixty days

[fol. 73] The bill alleges that the defendants will, unless restrained, take summary action to collect the more than $40,000 alleged to be due upon the property purchased during the quarter ending June 30, 1936. It further states that like or greater amounts of property will be purchased during quarter years to come. Temporary and permanent injunctions are asked against future exactions as well as the claim for the second quarter of 1936.

The defendant's motion to dismiss raises questions which have narrowed to two: (A) Does there exist for the plaintiff an adequate remedy at law? (B) Is the threatened exaction void for repugnance to the Federal Constitution?

(A) We hold that the plaintiff has no adequate remedy at law.

Plaintiff presents several reasons to support its contention that, if the tax is unconstitutional, it has no adequate legal remedy. It will be necessary to consider only one of the

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after the tax or the amount herein required to be collected and paid to the State becomes due and payable, and failure to bring suit within said sixty days shall constitute waiver of any and all demands against the State on account of alleged overpayments hereunder. No grounds of illegality shall be considered by the court other than those set forth in the protest filed at the time of payment of the tax or the amount herein required to be collected and paid to the State.

"If in any such action judgment is rendered for the plaintiff, the amount of the judgment shall first be credited on any taxes or amounts due from the plaintiff under this act, and the balance of the judgment shall be refunded to the plaintiff. In any such judgment, interest shall be allowed at the rate of six per cent per annum upon the amount found to have been illegally collected from the date of payment of such amount to the date of allowance of credit on account of such judgment or to a date preceding the date of the refund warrant by not more than thirty days, such date to be determined by the Controller.

"In no case shall any judgment be rendered in favor of the plaintiff in any action brought against the State Treasurer to recover any amount paid hereunder, when such action is brought by or in the name of an assignee of the retailer or other person paying said amount, or by any person other than the person who has paid such amount."

grounds urged, which ground, in our opinion, is controlling.

The Use Tax Act provides but one forum for the recovery by suit at law of taxes paid under protest (Section 29, note 8, supra). This forum is "a court of competent jurisdiction in the county of Sacramento". Obviously this provision contemplates a suit only in the state court.

When a bill in equity is brought in a federal court, the test of the adequacy or lack of adequacy of the remedy at law is the legal remedy afforded in the federal court. Where no legal remedy exists in that forum, the remedy at law is inadequate. This conclusion is impelled by a consideration of the nature of the right to sue in the federal courts. It is a substantial constitutional right. Arrowsmith v. Gleason, 129 U. S. 86. When one has a cause of action at law, and [fol. 74] there exist requisites of federal jurisdiction, his remedy at law is the right to sue in the state or federal tribunal at his election. To deprive him of this choice materially impairs the completeness and adequacy of his remedy.

In Smyth v. Ames, 169 U. S. 466, 515, 516, 517, a statute of Nebraska set up a board to prescribe maximum railroad rates. Any railroad deeming itself aggrieved was permitted to bring an action in the supreme court of the state to show that the rates fixed were unjust. If the state court sustained the contention of the railroad it was authorized to issue an appropriate order to the board requiring a correction of the inequity.

Suit was brought by a railroad company in the United States District Court to enjoin the enforcement of the statute. The Supreme Court of the United States held that a case of equity jurisdiction was made out, saying:

"* * * The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a Federal Court, is not to be conclusively determined by the statutes of the particular State in which suit may be brought. One who is entitled to sue in the Federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action. * * * A State cannot tie up a citizen of another State, having property rights within its territory invaded by unauthorized

acts of its own officers, to suits for redress in its own courts'."

In Chicago, B. & Q. Ry. v. Osborne, 265 U. S. 14, 16, a railroad company brought suit in the federal court to restrain the collection of taxes levied by the State of Nebraska which taxes were alleged to be unjustly discriminatory. The state law provided a remedy by writ of error to the Board of Equalization from the supreme court of the state. In holding that the taxpayer was authorized to seek federal equity relief, the United States Supreme Court said:

[fol. 75] "If an action to recover the payment were allowed, the suit might be brought in the Courts of the United States, under the usual conditions, as well as in those of the State. * * *. But the writ of error, of course, can be sued out only in the State, and a remedy in the State Courts only has been held not to be enough. Smyth v. Ames, 169 U. S. 466, 516. St. Louis-San Francisco Ry. Co. v. McElwain, 253 Fed. 123, 136. Franklin v. Nevada-California Power Co., 264 Fed. 643, 645."

The principle was reaffirmed in Risty v. Chicago, etc. Ry. Co., 270 U. S. 378, 388:

"* * * the test of equity jurisdiction in a federal court is the inadequacy of the remedy on the law side of that court and not the inadequacy of the remedies afforded by the state courts. Smyth v. Ames, 169 U. S. 466; Chicago B. & Q. R. Co. v. Osborne, supra."

(B) We hold that the tax sought to be levied upon the plaintiff is an unconstitutional burden on interstate commerce.

The tax in question is laid upon the exercise of certain rights of ownership over personal property; these rights being enumerated in the broad statutory definitions of "use" and "storage" (footnote 6, supra). It is not an ad valorem property tax, admittedly valid although the property consist of instrumentalities of interstate commerce, nor is it a tax on the privilege of doing an intrastate business, upheld in Pacific Telephone Co. v. Tax Commission, 297 U. S. 403.

The plaintiff does not urge constitutional objections other than the contention that the enforcement here will unduly

burden interstate commerce. And even under this heading there can be no objection to the excise on the ground that the materials were imported into the state before the incidence of the tax. Henneford v. Silas Mason Co., 300 U. S. 577.

The question narrows, then, to the issue whether at any time after their importation into the State of California, [fol. 76] the materials purchased by the plaintiff were not in use in interstate commerce. If they at all times were in actual interstate commerce use or intermixed interstate-intrastate commerce use, that use cannot be subjected to a state tax. It is well settled that such a tax constitutes a forbidden burden on interstate commerce. Helson and Randolph v. Kentucky, 279 U. S. 245, 249, 252; Bingaman v. Golden Eagle Western Lines, 297 U. S. 626, 628; Cooney v. Mountain States Tel. Co., 294 U. S. 384, 393.

By their motion to dismiss the defendants admit the facts pleaded in the complaint. That is, they admit that the items of property they seek to tax "were devoted to the service of transportation immediately upon their purchase", that their financing and accounting was carried on "according to the accounting rules and regulations prescribed for railroads engaged in interstate commerce under the provisions and requirements of the Interstate Commerce Act", that each item was an essential and vital factor in the maintenance and repair of plaintiff's interstate commerce plant, that at all times since their purchase "said materials were allocated and dedicated to sole and exclusive use in interstate commerce and any keeping or retention thereof within the State of California was and is an inseparable part of the use of said materials and each item thereof in interstate commerce."

Thus defendants admit the factual contention that plaintiff's use of the purchased materials at all times since their purchase was a vital use in interstate commerce. Nevertheless they urge that as a matter of law the only interstate commerce use which is free from state taxation is use by way of actual physical consumption or use occurring after the materials have been installed in the operating plant, such as the gasoline being consumed in the Helson and [fol. 77] Bingaman cases, or the telephone instruments actually installed in the Cooney case.

The statute specifically exempts property protected from taxation by the Constitution. While this does no more than

declare what already is the law, it demonstrates the solicitude of the legislature toward the recognition of constitutional limitations. It indicates that when the legislature defined taxable storage and use it was anxious to insure that interstate commerce use would be protected. Yet defendants would have the statute read:

"(a) 'Storage' means and includes any keeping or retention in the State * * * of tangible personal property (when such keeping or retention is an inseparable part of the use of such property in interstate commerce, when such property is allocated and dedicated to interstate commerce from the moment of its purchase and is recognized by the Federal Government through the Interstate Commerce Commission as a portion of the capital of the taxpayer used in interstate commerce) * * *."

"(b) 'Use' means and includes the exercise of any right or power over tangible personal property incident to the ownership of that property (which exercise of right or power is a part of the use of such property in interstate commerce prior to a subsequent use by way of consumption) * * *."

We do not believe the statute is thus to be construed. However, if this is the meaning of the act, then we are forced to conclude that it is an unconstitutional exertion of power by the state legislature.

This conclusion is impelled by a realistic approach to the facts presented by the bill. In Pacific Telephone Co. v. Tax Commission, 297 U. S. 403, 413, the Supreme Court, dealing with the validity of a state tax, repeated its earlier admonition in Gregg Dyeing Co. v. Query, 286 U. S. 472, 480: "The question of constitutional validity is not to be determined by artificial standards."

Whether a use in storage for current consumption is a [fol. 78] use in interstate commerce is a question of ultimate fact. Here the court must find or refuse to find this ultimate fact upon the admitted facts and upon those of which it takes judicial notice. It cannot use "artificial standards". It must consider actual business and industrial concepts.

The question is analogous to that presented by a merchandising company's stock for sales in the current season, stored for daily supply of its counters. If such storage is

a use other than a merchandising use, what use is it? Or take the case of a canner's stock of cans stored in his plant at th beginning of a fruit season from which stock there is daily withdrawn those required for the arriving fruit. What sort of use is the storage of these cans, if not a canning use?

Certainly any merchandiser or canner or other industrialist or business man would consider it a glaring example of the application of an "artificial standard" to say that such a storage for current consumption was not a use in the business or industry in question. He might well answer: What other business have I in which that storage has any use?

When we view realistically the facts set out in the bill, supplemented with our judicial notice of the practical necessities of a large transportation enterprise, we clearly [fol. 79] perceive that this property is used in interstate commerce from the time of its purchase.

Consider first the property purchased for and devoted to a sole, fixed and predetermined use in an existing interstate commerce maintenance program. The storage of such property is a use which is as integral a part of the interstate commerce project as are the rails over which interstate trains are actually running. It is the definite predetermined character of its purpose that makes the storage of these purchased articles of equipment as vital to the entire plant before installation as well as afterwards. The situation differs materially from that of the purchase of a body of goods a part or all of which will, in the ordinary turn of events, be used in the future in interstate commerce operations.[9]

It is no answer to say that the plaintiff might change its intention after purchasing and use the property for some purely intrastate purpose not intended at the time of purchase. Granting tha: such legal right exists, it would be as persuasive to argue that the state might tax the use of an interstate locomotive in operation on the theory that its owner is privileged to use it at any time for a purely local purpose. The question concerns not what the plaintiff might do; it concerns, rather, what the plaintiff i actually doing.

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[9] See Nashville, Chattanooga & St. Louis Ry. v. Wallace, infra.

Likewise, property purchased for the sole, fixed and predetermined purpose of serving as "standby" or reserve [fol. 80] equipment in an interstate commerce plant is employed in interstate commerce from the time of its purchase. It is almost axiomatic that the far flung system of an interstate railroad cannot be conducted without the presence of reserves supplies. Unpredictable events requiring replacement and repair are of daily occurrence. A flood washes out a section of track. Can it rationally be argued that the rails and ties held in readiness against this emergency are not an integral portion of the company's interstate commerce equipment? One might as well contend that a derail switch is not in use in interstate commerce until an emergency requires it to function.

The distinction which the defendants would have us make between property before and property after installation, whether purchased for an existing necessity or as reserve, strikes us as no more cogent than the argument that the use of a railway station could be taxed because for long periods no interstate trains stop in front of it and no interstate passengers or freight make use of it; or the argument that the use of a locomotive is taxable by the state during the period in which it is standing idle between interstate trips; or that the telephones held non-taxable in the Cooney case, supra, should be subject to excise because there were long periods when no interstate calls were being made on any one of them.

In short, a use by way of storage or retention of materials can be fully as vital to interstate commerce as a subsequent use by way of consumption or after installation. A somewhat similar situation is presented by a requirement of [fol. 81] pilotage fees which a vessel leaving or entering a harbor must render to a pilot whether or not it avails itself of his services. Pacific Mail S. S. Co. v. Joliffe, 2 Wall. 450.

The Federal Government has recognized the interstate character of the use of materials like those described in the complaint through regulations (having the force of law) issued by an administrative agency, the Interstate Commerce Commission.[10] We do not believe that the California

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[10] I. C. C. classification of accounts for steam railroads:

"716. Material and Supplies.

"This account shall include the balances representing the cost, less depreciation, if any, of all unapplied material such

Legislature, specifically declaring in section 4 of the Act (note 7, supra) its intention to recognize the constitutional prohibition against the taxation of the use of materials in interstate commerce, intended nevertheless to subject to taxation the use of materials not only set apart by the carrier for interstate commerce uses, but recognized as so devoted by the Federal Government.

In a case calling for the determination of whether a particular use of materials is an intrastate or an interstate use, we touch upon the boundary between state and federal power. The requirement of materials for current repairs [fol. 82] and replacement is so obviously a necessity for interstate commerce that no legislation has been needed to compel it. However, the Congress could well pass a statute requiring that:

"Interstate carriers shall purchase and store for current repairs necessary materials for the efficient conduct of their railways, said *usage* by said carriers of said materials awaiting current installation to be maintained in places convenient to the places of their installation."

To illustrate how our decision in this case may affect the scope of federal power, we assume that the above statute has been passed. In opposition to it we have the instant state use tax act which the defendants would have read:

"(a) 'Storage' means and includes any keeping or retention in this State for any purpose * * * of tangible personal property (including materials purchased and stored by interstate carriers for current repairs and maintenance necessary for the efficient conduct of their railways) * * *."

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as road and shop materials, articles in process of manufacture by the accounting company, fuel, stationery, and dining car and other supplies. In determining the cost of material and supplies suitable allowances shall be made for any discounts allowed in the purchase thereof.

"NOTE.—Balances representing the cost of unapplied construction material and supplies located at the point of use, which have been purchased for projected new roads and extensions, are provided for in road and equipment account No. 47, 'Unapplied construction material and supplies'."

The power delegated to Congress under the commerce clause is paramount to the reserved power of the state, when the two come in conflict. Minnesota Rate Cases 230 U. S. 352, 399; National Labor Relations Board v. Santa Cruz Fruit Packing Co., (C. C. A. 9) decided July 31, 1937. Hence in such a conflict of opposing authority presented by the statutes pictured above, this court would be required to indulge every presumption in favor of the Congressional determination that the usage of materials described in both statutes was a use in interstate commerce. Ogden v. Saunders, 12 Wheat. 213, 269. Such determination being a reasonable hypothesis, we would be required to accept it as true. Against it the state statute would necessarily fall as invalid. It is because of this possible conflict that we can- [fol. 83] not apply the Bushrod Washington doctrine of Ogden v. Saunders to the state tax legislation challenged in this case.

Conversely, when the state acts within the scope of its reserved powers every presumption is indulged in favor of the validity of its legislation. Such was the case in Pacific Gas & Electric Co. v. Sacramento Municipal Utility District, No. 8500, recently decided by the Circuit Court of Appeals for the Ninth Circuit.

In support of their contention that the materials in question here are subject to the use tax, the defendants rely strongly on the case of Nashville Ry. Co. v. Wallace, 288 U. S. 249, 261, 266. In that case the railroad brought suit in a Tennessee court for a declaratory judgment holding unlawful an excise tax of that state levied upon the storage and withdrawal from storage of gasoline.

The railway purchased the gasoline from points outside the state, brought it into Tennessee and stored it in private tanks. Subsequently all of it was withdrawn from storage to be used as a source of motive power in interstate railway operations. The company assailed the tax both on the ground that the gasoline while stored was still a subject of interstate commerce and on the ground that because of its subsequent use as fuel, the tax was in effect a tax upon the use of the fuel in interstate commerce. The Supreme Court affirmed the highest court of Tennessee in decreeing that the tax was valid. In answer to the railway's first contention it said (p. 266):

"The gasoline, upon being unloaded and stored, ceased to be a subject of transportation in interstate commerce and lost its immunity as such from state taxation. * * * The fact that the oil was, in the ordinary course of appellant's business, later withdrawn from storage for use, some within and some without the state, part of it thus becoming again the subject of interstate transportation, did not affect the power of the state to tax it all before that transportation commenced."

In answer to the argument that the tax was one in effect upon the use of gasoline in interstate transportation, it [fol. 84] was held (p. 267):

"We cannot say that the tax is a forbidden burden on interstate commerce because appellant uses the gasoline *subsequent* to the incidence of the tax as an instrument of interstate commerce. Taxes said to burden interstate commerce directly when levied upon or measured by the operation of interstate commerce or gross receipts derived from it, are beyond the state taxing power * * *.

"But interstate rail carriers are not wholly immune from other forms of non-discriminatory state taxation, even though the burden of the tax is thus indirectly or incidentally imposed upon the interstate commerce in which they are engaged. It cannot be doubted that, when the gasoline came to rest in storage, the state was as free to tax it, notwithstanding its *prospective* use as an instrument of interstate commerce, as it was to tax appellant's right of way, rolling stock, or other instruments of interstate commerce, which are subject to local property taxes." (Emphasis supplied.)

Here the Supreme Court makes a finding of ultimate fact that the storage was not a use in interstate commerce. The admitted probative facts in that case upon which the finding of ultimate fact was made are not the same as in the instant case. In the case at bar the admitted fact is that the storage is an immediate and not a "prospective use" in interstate commerce.

It is plain from the above quotation that the Supreme Court did not have before it for decision in the Nashville case the question whether or not the gasoline stored was already set apart, devoted, and predetermined for use in interstate commerce before it entered the state. We have

studied exhaustively not only the opinion of the Supreme Court but also the record and briefs in that case. Nowhere do we find that the gasoline upon entering the State of Tennessee or upon its deposit in the storage tanks was allocated, set apart, and dedicated to interstate commerce uses. Nowhere do we find contention or proof that the stored gasoline was a part of the railroad's current operating inventory, recognized as such by the Federal Govern-
[fol. 85] ment. It was nowhere argued that the gasoline while in the tanks was being used in interstate commerce. As we have already indicated, property is not exempt from state use taxation merely by virtue of the fact that in the ordinary turn of events it will be used in interstate commerce, or the fact that subsequently all of it has been so used. In each case there must be facts, admitted or proved, which show that the keeping or retention is in itself a use in interstate commerce.

What we have said of the Nashville case is equally true of Edelman v. Boeing Air Transport, 289 U. S. 249, 251, 253. In that case the taxpayer purchased gasoline within and without Wyoming and stored the same in tanks at its Wyoming airports. It was subsequently withdrawn, some for local sale, some for local use, and some for fueling the taxpayer's interstate airplanes. Wyoming levied an excise tax on the use of gasoline, the incidence of the tax falling on the withdrawal from storage. The taxpayer objected to paying the excise on the fuel withdrawn for interstate planes. The Supreme Court held against the taxpayer, saying that the ruling facts of the case were identical with those in the Nashville decision.

Our examination of the Edelman decision reveals that, as in the Nashville case, there was neither contention nor proof made that the gasoline taxed was set apart or allocated by the taxpayer to an interstate use before it was actually being consumed in the planes; nor any evidence that it was in any way brought under the jurisdiction of the Interstate Commerce Commission. The case is even weaker than the Nashville decision, in view of the fact that when the gasoline was put in storage only an indefinable part of it
[fol. 86] was subsequently to be used in interstate commerce.

We hold, therefore, that the Nashville and Edelman cases are not controlling on the facts alleged in this complaint. The facts alleged and admitted here bring this case within

the principle of the Helson, Bingaman and Cooney cases. In this view it is unnecessary to consider whether the authority of the Nashville and Edelman cases is weakened by Graves v. Texas Co., 298 U. S. 393, 401, wherein it was held, without mentioning the Nashville and Edelman decisions, that a state tax levied on the withdrawal of gasoline from storage for delivery to the United States was void as being an exaction against the activities of the Federal Government.

Reaching a conclusion similar to that of the District Court for Washington, in construing like provisions of a use tax of that state,[11] we hold that the defendants may not constitutionally enforce the provisions of the California Use Tax Act against the plaintiff upon the property set out in the complaint.

The defendants are at liberty, of course, to put the plaintiff to proof of its allegations of present use of the materials as alleged in the bill. And nothing in this opinion bears upon the right of a state to levy a tax upon the intrastate use or property such as that in issue here, under any formula calculated reasonably to apportion the interstate [fol. 87] and intrastate commerce uses.

The motion to dismiss the complaint is denied. Plaintiff will be awarded an interlocutory injunction. Plaintiff will prepare and file proposed findings of fact, conclusions of law, and decree.

William Denman, U. S. Circuit Judge. Michael J. Roche, U. S. District Judge. A. F. St. Sure, U. S. District Judge.

[File endorsement omitted.]

[fol. 88] In United States District Court

[Title omitted]

Decree for Interlocutory Injunction—Filed November 16, 1937

This cause came on regularly for hearing pursuant to order to show cause issued on the 10th day of July, 1936, on plaintiff's verified complaint and motion for interlocu-

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[11] Northern Pacific Ry. v. Henneford, 15 Fed. Supp. 302.

[fol. 89] tory injunction, and the Court having considered the record, pleadings and files herein, and the argument of counsel, and the opinion of the Court having been filed on September 10, 1937, and the Court's findings of fact and conclusions of law having been filed on the 16th day of November, 1937, and the Court having found and concluded therein that the plaintiff is entitled to an interlocutory injunction as prayed for;

Now, Therefore, it is hereby Ordered, Adjudged and Decreed as follows:

1. Pending the final determination of this action and until the further order of this Court, the defendants John C. Corbett, Fred E. Stewart, Richard E. Collins, Ray L. Edgar, and Harry B. Riley, as members of the State Board of Equalization of the State of California, State Board of Equalization of the State of California, and U. S. Webb, the Attorney General of the State of California, and each of them, their successors, and any and every person acting or attempting to act under and by virtue of the authority of the California Use Tax Act of 1935, Chapter 361 of the Statutes of the State of California for 1935, and acts amendatory thereto, and all persons to whom notice of this injunction shall come, be and they are hereby enjoined and restrained from threatening, attempting or proceeding to enforce or to take any steps to enforce said California Use Tax Act of 1935, Chapter 361 Statutes of 1935 of the State of California, as against the plaintiff herein, or any of its agents, servants and employes, on account of any claim that said California Use Tax Act applies to the taxation of tangible personal property purchased or to be purchased by plaintiff at points outside of the State of California and brought into said State for storage, use or other consumption in said State of California, by plaintiff in its business in operating an intrastate and interstate railroad and in [fol. 90] conducting intermingled interstate and intrastate transportation as a carrier by railroad, either within or without the State of California, and they and each of them are further enjoined from imposing or collecting on account thereof any taxes, penalties or interest thereon, or from commencing any prosecution of suits or issuing any summary process against the plaintiff on account thereof, or from proceeding or attempting to set up, assess or claim

any such taxes, penalty or interest against the plaintiff on account of any such purchases.

2. It is further ordered and adjudged that this decree and injunction shall become effective and operative upon the filing by the plaintiff of a bond in a form required by law, in the sum of $301,000.00, to be approved by this Court, and upon the filing of such bond the bonds heretofore filed by plaintiff as required by the temporary restraining order heretofore entered will be exonerated and discharged.

3. When any further payments under the California Use Tax Act of 1935 shall become by the terms thereof due and payable by said plaintiff, then upon the filing of a good and sufficient bond approved by the court or any judge thereof in an amount agreed upon between the parties to this cause, said interlocutory injunction shall be extended to the enforcement of said act as to any such payments; and if the parties fail to agree on the amount of such additional bond, any of the parties may move the court to take any action of which he or they may be advised.

Dated: November 16, 1937.

William Denman, United States Circuit Judge.
Michael J. Roche, United States District Judge.
A. F. St. Sure, United States District Judge.

Approved as to Form:

U. S. Webb, Attorney General, State of California, by H. H. Linney, Deputy, Attorney for Defendants.

[File endorsement omitted.]

[fol. 91] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER TO BILL OF COMPLAINT—Filed September 30, 1937

[fol. 92] Come Now the defendants above named, and answering the Bill of Complaint on file herein, admit, allege and deny as follows:

I

Defendants admit the allegations found in paragraph I of said complaint.

II

Defendants admit the allegations found in paragraph II of the complaint on file herein, except that said defendants deny that the tax imposed under the Use Tax Act of 1935, Chapter 361, Statutes 1935 of the State of California, constitutes a tax upon the use of said materials in carrying on interstate transportation, or that said tax constitutes a tax and burden upon the privilege of using said materials in conducting interstate transportation or that said tax is a burden on interstate and foreign commerce, contrary to and in violation of the provisions of Article I, Section 8, Clause 3, and Article I, Section 10, Clause 2 of the Constitution of the United States, or that the imposition or collection of said tax effectuates a taking of plaintiff's property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, as alleged in paragraph II of said complaint.

III

Defendants admit the allegations found in paragraph III of said complaint on file herein except that defendants deny that the said materials were or are in the process of being transported in interstate commerce to the places of use during the time in question herein, or that said materials so distributed and held for such uses and the process of distribution thereof are inseparably and essentially a part [fol. 93] of the conduct of transportation by railway; or that the greater portion of said articles were and are especially designed for use in the operation, maintenance and repair of said railroad, or that said materials were peculiarly adapted to railroad uses as aforesaid, and are not suitable for any other use, all as alleged in paragraph III of said complaint.

Further defendants deny that all of said items of tangible personal property so purchased by the plaintiff, were devoted to the service of transportation immediately upon their purchase, or that upon the purchase of said articles they immediately became a necessary and indispensable part of working capital, material, supplies, equipment and instrumentalities for the operation of said railroad, or that said articles, and each and all of them became, were and are instrumentalities used indiscriminately and inseparably in the operation, maintenance and repair of plaintiff's rail-

road for conducting interstate transportation and intrastate transportation from the time the same were purchased therefor; or that said items and materials were inextricably devoted to and used in service of both classes of commerce from time of purchase outside of the State of California, all as alleged in paragraph III of said complaint on file herein.

Defendants further deny that said articles of tangible personal property sustained no storage of any character which intervened between the ending of the interstate transportation thereof which followed the purchase of said items of property and the time when the same and each item thereof was allocated and dedicated to uses in the conduct of transportation by plaintiff's railroad, or that the said materials and each item thereof were purchased by said [fol. 94] plaintiff outside of the State of California, for the sole and exclusive use and conduct of its business as an interstate carrier, or that at all times from the purchase of said materials until use of said materials and each item thereof by said plaintiff, said materials were devoted, dedicated and inseparably set apart exclusively for interstate commerce, or that prior to any keeping or retention of said materials within the State of California, said materials were allocated and dedicated to sole and exclusive use in interstate commerce or any other type of commerce, or that any keeping or retention of said materials within the State of California was and is an inseparable part of the use of said materials and each item thereof in interstate commerce, or any other type of commerce, all as alleged in paragraph III of said complaint.

IV

Defendants admit the allegations found in paragraph IV of said complaint on file herein.

V

Defendants admit the allegations found in paragraph V of said complaint on file herein, except that defendants deny that the Use Tax Act of 1935 and the tax imposed thereby is not a bona fide revenue measure or that it is a measure intended to lay, and which has the effect of laying a burden upon interstate commerce, and the privilege of doing business in interstate commerce, or that it denies to the plain-

tiff the right to exercise the usual incidents of ownership or that it denies to plaintiff the right to operate a railroad in interstate transportation, all as alleged in paragraph V of said complaint on file herein.

Further defendants deny that the resolution passed on [fol. 95] September 5, 1935, by the State Board of Equalization, declares the purpose, nature and effect of said Use Tax Act, or that the tax imposed upon plaintiff thereunder by defendants discriminates against plaintiff in that the same does not apply equally to all persons introducing tangible personal property into the State of California for use therein, or that said Act is applied by said defendants only to items and articles of tangible personal property, which in the opinion of the defendants, compete with products of California manufacturers or producers, or that the application or operation of said tax as applied by these defendants to this plaintiff, constitutes an unreasonable and undue discrimination against this plaintiff, or that said Act as applied herein works great hardship upon this plaintiff, and will continue to do so, unless restrained by this Court, as prayed for in said complaint, all as alleged in paragraph V of said complaint.

VI

Defendants admit the allegations found in paragraph VI of said complaint on file herein.

VII

Defendants admit the allegations found in paragraph VII of said complaint on file herein.

VIII

Defendants deny that the imposition of said taxes upon plaintiff as alleged in said complaint under the said Act, as the same is, and has been construed and applied by said defendants, and each of them, is in violation of Article I, Section 8, Clause 3 of the Constitution of the United States, and Article I, Section 3, of the Constitution of the State of California, or that said tax constitutes a direct burden on [fol. 96] interstate and foreign commerce, contrary to and in violation of the provisions of Article I, Section 8, Clause

3, and Article I, Section 10, Clause 2 of the Constitution of the United States, or that the tax is a taking of plaintiff's property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, and Article I, Sections 3 and 13 of the Constitution of the State of California, as alleged in paragraph VIII of the said complaint on file herein.

IX

Defendants admit the allegations found in sub-division (a) of paragraph IX of the complaint on file herein, but deny all the remaining allegations of paragraph IX of said complaint on file herein.

As a separate, further and distinct answer, defendants allege as follows:

I

That subsequent to the date that the tangible personal property referred to in the Bill of Complaint on file herein was purchased, and at all times prior to the date when said property was installed, after interstate transportation of the property had ended, the property was not used in plaintiff's interstate railroad business, or in plaintiff's inextricably intermingled intrastate and interstate railroad business.

II

That subsequent to the time that plaintiff purchased, outside of the State of California, the said property, and after the interstate transportation of said property into the State of California had ended, the said property was stored in the State of California and placed in plaintiff's private [fol. 97] warehouse, or on plaintiff's private property for some period of time prior to the date that plaintiff actually installed said property in its railroad system or actually used the same in its inextricably intermingled interstate and intrastate railroad business.

III

That plaintiff after the interstate transportation of said tangible personal property had ceased, and after the property was stored at points in the State of California, and

subsequent to the date of installation of the same into plaintiff's railroad system, used or will use all of said property in conducting its inextricably intermingled interstate and intrastate railroad business.

IV

That the State Board of Equalization has demanded payment of the use tax from plaintiff for the privilege of storing said property in the State of California after interstate transportation of the same has ended and prior to installation of the same, and further for the privilege of using the property in its intrastate railroad business only; that the amount of the tax was not increased because plaintiff used the property in its interstate railroad business.

V

That the plaintiff at the time of the shipment of said tangible personal property from points of origin did not arrange a destination for the property other than plaintiff's points of storage in the State of California.

VI

That plaintiff was free to use the property in its railroad business or for any other purpose after transportation had ceased and the property was stored in the State of California.

[fol. 98] Wherefore, defendants pray that plaintiff take nothing by its action herein, that the Bill of Complaint be dismissed, for costs of suit, and for such further relief as the Court may deem meet and proper in the premises.

U. S. Webb, Attorney General; H. H. Linney, Deputy Attorney General; James J. Arditto, Deputy Attorney General, Attorneys for Defendants.

(Due service and receipt of copy of the within Answer admitted this 30th day of September, 1937.)

Harry H. McElroy, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 99] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION OF FACTS—Filed December 22, 1937

In addition to the facts alleged in the bill of complaint and which are admitted by defendant's answer filed herein, it is stipulated that the following are admitted facts for the purposes of this action and for such purposes only, to wit:

[fol. 100] Plaintiff's Railroad Operations

1. Whenever plaintiff's "railroad" or "railroad transportation plant" or "railroad operations" are hereinafter referred to in this stipulation, the same shall refer to and mean the plaintiff's railroad plant, facilities or railroad operations inseparably devoted to the service of intrastate, interstate and foreign transportatior Whenever the term "conducting transportation" is hereinafter used, it shall refer to conducting transportation inseparably in intrastate, interstate and foreign commerce. Hereafter the use of the present tense indicates a continuous course of action during all of the time material to the issues in this action.

2. Plaintiff's interstate and intrastate railroad system, described in the complaint, is inseparably and inextricably devoted to the services of intrastate, interstate and foreign transportation and commerce, the same rails, the same facilities, and the same organization being devoted to and used inseparably in plaintiff's said transportation enterprise. All branch lines of railroad forming a part of plaintiff's transportation plant within the State of California carry interstate transportation as well as intrastate transportation, and every part of said railway transportation plant is subject to interstate and foreign uses as well as intrastate uses. The branch lines of railroad are feeder and distribution lines appurtenant to the main interstate lines and are an essential and useful part of plaintiff's railroad plant in the handling of interstate and foreign commerce as well as intrastate commerce.

Purchases of Property by Plaintiff

3. In the necessary operation, maintenance and repair of plaintiff's railway transportation plant and the facilities

and equipment thereof, plaintiff purchases large amounts of tangible personal property consisting of equipment, facili- [fol. 101] ties, materials, supplies, shop machinery, tools, printed matter and publications, which property is described in the bill of complaint herein and in Exhibits "A" and "B" thereof, in accordance with the purposes, plans and methods hereinafter described, and in accordance with the purpose of doing and performing all of the acts and things with respect to said property, including holding and retention thereof in the State of California, which are hereinafter described. All of said purchases and the purchases hereafter to be made, which are pertinent to the issues of this case, were or will be purchases made in states other than California or in foreign countries and transported in foreign or interstate commerce into the State of California, for the uses and purposes hereinafter described. The tangible personal property described in the complaint represents typical classes of property purchased as hereinafter related, by plaintiff for its railway transportation purposes.

4. The total purchases of tangible personal property involved in this action and the taxes claimed to be due from the plaintiff on account thereof for each quarter to and including the quarter ending September 30, 1937, are as follows:

Quarter Ending	Total Price of Tangible Personal Property	Tax Claimed To Be Due
June 30, 1936	$1,590,190.62	$47,705.72
Sept. 30, 1936	1,258,022.74	37,740.68
Dec. 31, 1936	1,429,470.82	42,884.12
Mar. 31, 1937	1,989,206.12	59,676.18
June 30, 1937	1,798,360.97	53,950.83
Sept. 30, 1937	1,861,558.70	55,846.76

Accounting

5. The purchases of all property for the operation, maintenance and repair of plaintiff's railroad were and are made by the plaintiff through the use of its operating capital con- [fol. 102] sisting of money or current assets definitely devoted to the service of transportation, or through the credit of said plaintiff as a railroad engaged in the service of transportation and upon the purchase of said materials and the payment therefor, the expenses therefor were and are in

due course charged into the operating expenses of said carrier to the appropriate accounts for operation, maintenance or repairs, according to the accounting rules and regulations prescribed for railroads engaged in interstate commerce under the provisions and requirements of the Interstate Commerce Act.

6. Southern Pacific Company, as a railroad common carrier engaged in interstate commerce, is and was subject to valuation by the Interstate Commerce Commission under the Interstate Commerce Act and its valuation for rate making purposes was made by the Interstate Commerce Commission and said valuation is duly reported in Volume 45 of Interstate Commerce Commission Valuation reports, Page 1 (Decided June 10, 1933). The working capital allowed by the Interstate Commerce Commission in plaintiff's said valuation, as of the dates of basic valuation of each property included therein, as shown by said valuation report, amounted to the total sum of $19,022,626.00. The amount of working capital allowed in said valuation was segregated as follows:

Account 708-Cash	$5,277,896.00
Account 716-Material and supplies	13,744,730.00
	$19,022,626.00

The amounts carried in accounts 708 and 716 in the company's balance sheets as of the dates of basic valuation and June 30, 1936, are as follows:

[fol. 103]

	As of Date of Basic Valuation	As of June 30, 1936
Acct. 708-Cash	$14,667,978.87	$15,525,583.40
Acct. 716-Material and supplies	12,772,970.43	12,235,373.48
	$27,440,949.30	$27,760,956.88

The sum of $27,760,956.88, the amount of working capital as of June 30, 1936, is the approximate amount of working capital devoted to the service of transportation by the plaintiff at the times pertinent to this action.

7. The accounting which is performed in connection with the purchase and distribution of materials and supplies used for the maintenance, repair and operation of the plaintiff's

railroad, under accounting rules prescribed by the Interstate Commerce Commission, is in brief as follows:

Audited vouchers issued in payment of material and supplies purchased are charged to account 716- Material and Supplies, and are concurrently credited to account 760- Audited Accounts and wages payable.

When audited vouchers issued in payment for material and supplies are cashed by payees, the amount thereof is charged to account 760- Audited accounts and wages payable, and concurrently credited to account 708- Cash.

As material and supplies are issued for use in the maintenance and operation of the railroad, the value thereof is charged to account 531- Railway Operating Expenses (separately to each primary account applicable) and concurrently credited to account 716- Material and Supplies.

The uncashed audited vouchers outstanding (with exceptions not material here) remain in account 760 until paid and the debit balance in account 716 represents the amount of unapplied material and supplies remaining on hand.

[fol. 104] 8. Railroad materials and supplies are classified under the uniform classification of accounts for steam railroads prescribed by the Interstate Commerce Commission in accordance with Section 20 of the Act to Regulate Commerce as "Material and Supplies" in Account No. 716, which reads as follows:

"716. Material and Supplies

This account shall include the balances representing the cost, less depreciation, if any, of all unapplied material, such as road and shop material, articles in process of manufacture by the accounting company, fuel, stationery, and dining car and other supplies. In determining the cost of material and supplies suitable allowances shall be made for any discounts allowed in the purchase thereof.

NOTE.—Balances representing the cost of unapplied construction material and supplies located at the point of use, which have been purchased for projected new roads and extensions, are provided for in road and equipment account No. 47. 'Unapplied construction material and supplies' ".

"Unapplied material" means material purchased for specific intended use in the operation, maintenance and repair of the railroad and is carried in said Account 716 until actu-

ally placed or used for said purposes, and when actually placed and used said material is included in one of the accounts representing a disbursed expense.

The purchase price of property heretofore described was and is paid from working capital held as cash in banks for payment of current accounts and indebtedness incurred in the operation, maintenance and repair of the railroad and is known as Account 708 Cash, which reads as follows:

"708. Cash

This account shall include money, checks, sight drafts, and sight bills of exchange in the hands of the accounting company's financial officers and agents, or in transit from its agents and conductors for which such agents and conductors have received credit. It shall also include deposits with banks and trust companies subject to check.

All current expenses, including disbursements for the pur-
[fol. 105] chase of said materials and supplies are paid from said cash account 708.

Said working capital is necessary in the operation, maintenance and repair of the operating property of the said plaintiff.

9. Materials and supplies and working capital are classed in railway accounting practices, as prescribed by the Interstate Commerce Commission, as operative property, and the said working capital and materials and supplies carried in said accounts are and were at the times stated in the complaint a part of the operating property of the Southern Pacific Company. Additions and betterments to existing railway operating transportation plant are chargeable to the appropriate property accounts. Immediately upon the purchase of tangible personal property for railroad operation, maintenance and repairs of existing transportation plant, the same becomes and is subject to accounting in the manner and form hereinbefore described.

10. Taxes charged on account of the alleged storage, use or other consumption of the tangible personal property aforesaid under the California Use Tax Act of 1935, if required to be paid, would be a charge to and become a cost of conducting transportation in the same manner as other taxes against plaintiff's operating property are chargeable.

General Classes of Property Involved

11. The tangible personal property involved in this action is of two general classes: (a) property purchased to carry out a renewal or replacement of track, equipment, facilities, or structures in the existing transportation plant, which is also referred to as property purchased on specific orders; and (b) materials for current maintenance, or for use or consumption in conducting current operations, including [fol. 106] stand-by materials. Both of these classes of materials are subject to a further classification as (a) materials especially designed and manufactured upon approved specifications for railroad uses, (b) railroad materials manufactured upon plaintiff's particular specifications to meet its particular needs and purposes, and (c) general commercial materials.

12. The materials described as track materials, enumerated in plaintiff's Exhibit "A" are all materials especially designed for railroad uses and built according to approved specifications for such uses and are not practically adapted to any other uses. Some of such materials were especially manufactured to supply orders made by the plaintiff and to meet particular specifications as to quantities, quality, sizes and other characteristics defined in plaintiff's orders for such materials.

13. All property described as materials for maintenance of freight, passenger cars, locomotive and work equipment, shown by Exhibit "B", is materials especially designed and constructed for railroad uses and purposes such as air brakes parts, crane parts, axles, bolts and nuts, booster parts, journal boxes, brakes, car wheels, burners and lamps, car heating parts, car lighting parts, miscellaneous castings, steel chain, cotters, couplers, cylinder parts, retard devices, steel trap doors, miscellaneous forgings, headlight parts, airbrake hose, steam hose, lubricator parts, boiler insulation, stay bolts, tail lamps, knuckles, and all interchangeable parts for the repair of rolling stock and motive power and generally all parts for the repair of rolling stock, motive power, equipment, shop machinery and shop tools, excepting raw materials such as metal, cloth, wire, paper, glass, lumber, common wire nails, paint, oils, etc.

14. All of the materials described in Exhibit "B" as lubricants and waste for locomotives and cars such as graphite, driving journal grease, valve oil, locomotive and [fol. 107] journal box waste, are materials especially prepared for railroad purposes and uses. Such materials are manufactured to meet the common railroad specifications for such purposes.

15. All items of materials as shown by Exhibit "B" for maintenance of signal, telephone and power lines, are materials primarily manufactured for such uses and purposes. The materials, other than lines, for the maintenance of railway signal systems are especially designed for railroad uses and such materials are generally unfit for any other purposes.

16. Materials for maintenance and replacement of railway shop machinery and tools shown by Exhibit "B" are materials especially designed for such uses, but are susceptible of other uses. All repair parts for existing machinery are supplied upon particular specifications for use in the repair of a particular article of machinery and such repair parts are generally unfit for other purposes.

17. All items described as track and roadway tools shown by Exhibit "B" are articles especially constructed on specifications for railroad uses, but are susceptible of other uses, and excepting common saws, picks, shovels and other common tools usually carried in mercantile stocks for general uses.

18. A considerable part of the items described as train, station, and yard supplies, shown by Exhibit "B", are especially designed for railroad uses but are susceptible of other uses. The exceptions are those items commonly carried in the stocks of goods of retail merchants for general purposes such as sponges, paper, water hose, crayons, mop heads, mantles, cloth and raw materials.

19. All items for repair and maintenance of bridges, buildings, water and fuel pumping plants, shown by Exhibit "B", excepting raw materials and those articles commonly carried in retail stocks of goods, are materials especially [fol. 108] designed for or suitable for railroad purposes

but are susceptible of other uses. Steel work, parts for bridges, and bridge timbers are articles especially designed and prepared for the intended purposes and are usually constructed or manufactured according to particular specifications for plaintiff's particular uses, and are not economically susceptible to other than the intended use.

20. Railway stationery, blank forms, time tables, tickets, advertising, instruction books, books of rules and regulations and the like, are especially manufactured and printed for plaintiff's railroad uses and purposes and are unfit for any other uses.

Purchasing and Handling of Property

21. As a matter of practical economy, all purchases made by the plaintiff of property for use in conducting transportation are restricted to the least practical quantities required for current operations, repairs and renewals. All purchases are made on the basis of estimates and requisitions to meet current requirements and such estimates are made by those persons in charge of operations and maintenance throughout the entire railroad system, to wit: Division Superintendents, Division Engineers, Department Heads and their subordinates. Upon such estimates being made and communicated to the management, the managing officers of such railroad give authority for the expenditures for all classes of such property and all purchases made for the Purchasing Department are based on such estimates and the authority for such expenditures.

22. The purchasing department of the railroad is a part of the operating personnel of the railroad and all of the expenses of said department incurred in the purchasing of tangible personal property for railroad operation, maintenance, renewals and repairs are chargeable to railway operating expense.

[fol. 109] 23. The Storekeeper has charge of all railroad storehouses and material yards, and all such railroad storehouses and material yards are parts of railroad operating property and all of the expenses thereof and of the Storekeeper and his department which are incurred in the handling and distribution of tangible personal property for the operation, maintenance, renewal and repair of the railroad operating transportation plant are ultimately charged

to the same accounts in which cost of such materials are included. When carload lots are delivered to plaintiff at points outside of California, the shipment is either consigned to point of use for unloading directly at the job, if for repairs or renewals, or to point of distribution for operations, or made by transfer to work train, to the Store Department, supply cars, or may be unloaded at storehouses or material yards. When unloaded at any such destination, the unloading is performed by railway operating employes and at railway operating expense.

24. The Store Department keeps a record of all property received and distributed by it. Neither the Store Department nor any agent of the railroad receiving such property makes any use thereof, prior to its placement for installation or consumption, for any purpose other than to take custody thereof, make records thereof, sort, unpack or pack, break bulk, prepare, retain, handle or distribute the same and all detention and handling thereof at all times is on railroad operating property and at railroad operating expense.

25. All tangible personal property purchased as aforesaid is handled inbound, from the time the same reaches the rails of the plaintiff, as company material, on company material way bills and on free billing; and all of such property when received by plaintiff as purchaser and thereafter handled by the plaintiff in distribution over its lines of railroad, is likewise handled on free company billing, and the cost of all of such transportation over company rails is a charge [fol. 110] to railway operating expense.

26. At the time of the order and shipment of all tangible personal property involved in this action from the interstate points of origin, plaintiff gave shipping directions specifying destination for the property either at plantiff's points of installation, or at points of use such as terminals, shops, stations, or office buildings, or at points of distribution such as material yards, roundhouses, stations or storehouses. Plaintiff maintains storehouses and storerooms and material yards and other places of storage along all of its lines of railroad at principal terminals, at division points or at stations. Such places for the holding and detention of railway materials and supplies are all a part of a unified distribution system.

Installation of Specific Order Materials, etc.

27. Specific order materials, supplies, etc. are purchased and handled in the following manner:

In order to perform deferred maintenance, to replace parts of main line track which had or was about to reach the end of its service life and in order to make provision for the safe operation of high speed trains, of which the new streamliner passenger trains are an illustration, plaintiff, in the year 1936, commenced the reconstruction of certain parts of its main lines of railroad. The materials described in Exhibit "A" of the bill of complaint are materials which were purchased for the purpose of carrying out plaintiff's track renewal program in the year 1936. The necessity for such renewal program was ascertained prior to the year 1936 by inspection of the track, by experience in the life service of rail and ties and other materials in the railroad track which are subject to wear, and by reason of the determination to improve train schedules and to place in service certain passenger trains known as the streamliner trains to be [fol. 111] operated on faster train schedules.

In accordance with the information so ascertained and the necessity for making such track renewals, the management of the railroad caused an investigation to be made concerning all the necessary track renewals and improvements in roadway for the purposes aforesaid, the necessity for the elimination and improvement of curvature, improvement of grades, the character and specification of the materials required, and required to be made an estimate of the cost of carrying out such program. The information prepared for the carrying out of such program included specific data, including the number of miles of new rail to be laid, the number of ties, frogs, switch points, bridge timbers or other bridge materials, spikes, bolts, nuts, tie plates, and an itemization of other materials which would be required, such information constituting a complete specification of the work to be performed.

Upon receipt of such data, the Department of Maintenance of Way and Purchasing Departments were called upon to estimate the cost of such proposed renewals and the resulting information and estimates, together with the basic data and specific recommendations of the local officials, including the General Manager, were then submitted to the President of plaintiff's railroad, who in turn submitted the entire proposal to plaintiff's Board of Directors. The

Board of Directors approved said program, and in order to carry it into fulfillment the purchasing agent of said railroad was required to secure bids for the purchase of said materials. Upon receiving satisfactory bids, orders were placed for the purchase of said materials at points outside the State of California. The greater part of such materials was manufactured for the express purpose of filling plaintiff's orders therefor and when ready for delivery by the sellers thereof to plaintiff, instructions were given for the transportation of said materials to points on plaintiff's [fol. 112] railroad and over plaintiff's line of railroad to the several places of installation of said materials. Having information as to the dates of shipments and dates of expected arrival of said materials at such places of installation, gangs of workmen, known as "extra gangs" were assigned to the several points of installation in order that the materials would be installed in the railroad track with the utmost economy and dispatch. Said materials, including rails and ties, arrived at points of installation in carload lots and were unloaded from the cars upon the ground along the right of way at points of use and were installed by said extra gangs, all in accordance with the program theretofore made and outlined. The foregoing applies to the tangible personal property specifically described and set forth in Exhibit "A" of the bill of complaint.

As to similar property purchased by plaintiff, since the filing of said complaint and which will hereafter be purchased for use in California, to carry out track renewal programs, the procedure followed by plaintiff has been and will be substantially as follows:

In the fall of each year it is the custom and practice of plaintiff to follow the same procedure as above outlined with regard to any substantial renewal or betterment of its existing facilities. This annual renewal program is based upon estimates and recommendations of local officials and is included in the proposed budget which, if approved by the board of directors, follows the procedure above outlined with regard to the purchase and transportation into California and the installation of materials in California necessary to carry out the annual renewal program approved and authorized by plaintiff's board of directors.

All substantial repairs or renewals of railroad track, equipment, and the more important structures of the plaintiff's railroad transportation plant, insofar as the same deal

[fol. 113] with the purchase, transportation into the State of California, and installation of tangible personal property as a part of plaintiff's railroad facilities, are planned, programmed, authorized and completed in accordance with the hereinbefore described practice.

28. The track materials aforesaid were held or retained by plaintiff after the termination of their shipment to California by such delivery to the place of installation and before their installation in plaintiff's railroad for varying periods of time, the extent of such periods depending upon plaintiff's convenience, the stage of preparation for the installation thereof at the time of the arrival thereof at the point of distribution or installation, or other circumstances incidental to plaintiff's operations. The period of time between the termination of the shipments to California and the installation of the materials was no longer than was required for the convenient and effective installation thereof. The unloading, handling, retention and installation of such track materials were accomplished by railway employees and such installation, when accomplished, constituted a renewal or replacement of a part of the existing railway operating plant and became immediately a part thereof.

29. Materials for replacement or renewals of major structures such as buildings and bridges were and are handled in the same manner as above related, excepting articles required in less than carload lots, which are usually handled in the same manner as materials and supplies for current operations and maintenance.

30. Materials and supplies, equipment, tools or parts which are ordered to fill special requirements are delivered directly to the department making advance requisition therefor, and are not detained or held in any manner except such as is incidental to transportation to the place of installation or that which is incidental to such installation.

[fol. 114] Stand-By Facilities, etc.

31. In the interest of prompt and efficient public service and in the performance and discharge of its obligations to the public as a common carrier by railroad, plaintiff is required and compelled to have supplies and facilities to meet current requirements distributed over its entire line of railroad in quantities and at the times necessary to antici-

pate regular current requirements, and to have such reserves in quantities necessary to meet constantly fluctuating demands and emergencies which result from changes in the volume of business handled, traffic accidents, wrecks, weather conditions, washouts, and unforeseen operating conditions which commonly affect a railroad, and to meet the ordinary wear and tear which occur in connection with the use of its railroad and facilities.

Receipt, Distribution and Maintenance of Stand-By Materials

32. After the termination of the interstate shipment of stand-by materials and facilities, and upon their arrival at their places of destination on plaintiff's lines, the same are unloaded by plaintiff's employees directly to material yards, storehouses, shops, or other places maintained by the plaintiff as a part of its operating facilities for the detention of stand-by materials and supplies and plaintiff retains and holds them at such places as stated in the next paragraph.

33. Plaintiff retains and holds and keeps on hand said stand-by materials and supplies in space provided by it in the State of California at strategic points along its lines of railroad—i. e., at points suitable for prompt distribution of stand-by facilities, materials and supplies as needed—over its entire system of lines.

34. The distribution by plaintiff of stand-by materials and facilities to stores located at the points along its lines [fol. 115] of railroad aforesaid and the holding of such stand-by facilities at such places is necessary to insure the rendition by plaintiff as economically, efficiently and as free from interruption as possible of its interstate and intrastate railway transportation services.

Installation of Stand-By Facilities

35. When repairs become necessary to any part of plaintiff's railroad transportation plant or to any of the equipment or facilities thereof, plaintiff's employes who are charged with making such repairs take out or secure delivery to them from plaintiff's nearest place of detention thereof, such stand-by materials or facilities as are necessary to make such repairs.

When materials and supplies for current renewals, repairs or consumption are received at general stores in carload lots and such carload quantities are required at other points of use along the railroad, some part of such materials may be immediately reconsigned to such points of ultimate use, it being the practice of the plaintiff to distribute, as far as is practicable to do so, stand-by materials, supplies and facilities to most convenient points of distribution and as nearly as possible to the places of ultimate use thereof.

36. Between the time when stand-by facilities or stand-by renewal parts or materials are taken from plaintiff's stores or material yards, as above described, and the time when such articles are available as physically connected parts of plaintiff's railway transportation plant or of the equipment or facilities thereof, for carrying on interstate and intrastate transportation, time intervals occur during which such articles of property are retained or held in the possession of the plaintiff and are not in motion in the course of installation thereof, such time intervals being such as necessarily [fol. 116] occur in the transportation thereof to the places of installation and such as occur when such articles or parts are set down at the places where they are to be physically connected with plaintiff's railway plant or facilities or equipment thereof, and before further movement or handling thereof in the course of actual installation can proceed. After such articles are taken from plaintiff's stores or material yards or other places of detention as above described, there is no retention or holding of any of said facilities, except such as necessarily occurs in the ordinary and efficient course of transporting said facilities to their ultimate destination and installing them as physically connected parts of plaintiff's railway transportation plant or the facilities or equipment thereof.

37. There is no holding in any warehouse, storeroom or other like place of deposit, of any of the specific order property for renewals or replacements hereinbefore described, after the termination of the interstate shipment and the plaintiff's receipt thereof; however, time intervals during which such tangible personal property is retained or held in the possession of the plaintiff, and is not in motion in the course of installation thereof, occur between the time of termination of the inferstate shipment thereof and the time when the installation of such tangible personal property is

completed and the same is available as a physically connected part of plaintiff's railroad transportation plant for carrying foreign, interstate and intrastate transportation and commerce; said intervals being such as occur when such repairs or renewal parts are set down at the places where renewals or replacements are to be made and before further movement or handling thereof in the course of installation can proceed. There is no retention or holding of any said equipment except such as necessarily occurs in the ordinary and efficient course of transporting such tangible personal property to its ultimate destination and installing it as physically connected parts of plaintiff's railroad transportation plant.

[fol. 117] 38. At no time is the property herein referred to a part of a commercial stock in trade which is offered for sale or sold to the general public and plaintiff does not engage in the business of retailing any of the kinds of railway materials and supplies involved in this action and no part thereof is or was purchased or held for any purpose or purposes other than those herein described.

39. When stand-by facilities, materials and supplies are received, plaintiff's accounting department, pursuant to said accounting rules and regulations and uniform system of accounts for railroad common carriers charges the cost thereof to its "materials and supplies" account. Upon taking such supplies from its railway stores or other places of detention for installation as a part of plaintiff's plant, facilities or equipment or for consumption in railway operation, plaintiff credits the cost thereof to its said "materials and supplies" account and charges them to the appropriate account for railway operation or for maintenance of roadway or equipment or other maintenance, or to the appropriate property account, in accordance with the prescribed uniform system of accounts aforesaid.

The cost of handling and the cost of installation of all repair or renewal parts and the cost of handling of all of that class of materials which are consumed in operation are chargeable to operating expense or to operating property accounts and payable out of money devoted to transportation service. Such accounting is applicable to specific order materials and supplies as well as to stand-by materials and supplies.

40. The plaintiff did not change or alter the aforesaid purposes and uses of the tangible personal property involved in this action or its said intentions with regard thereto or divert any of said property to any other uses or purposes, and did not charge the cost of any part thereof [fol. 118] to any business or enterprise other than its railroad transportation business, at the time of the incidence of said tax according to the terms of the statute, or at any time material to the issues here involved, except as hereinafter stated.

41. Notwithstanding any statement hereinbefore made relating to the manner of purchase and use of materials for car repairs and car maintenance, some part of plaintiff's purchases in interstate commerce of materials for car repairs and car maintenance include materials which are used in the following circumstances:

It is the duty of common carriers by railroad to furnish cars for all classes of transportation which they undertake to perform and to provide cars for transportation throughout the United States by interchange with other lines of railroad. The interchange of cars between all lines of railroad is a part of transportation and such cars are inseparably used in both intrastate and interstate transportation. Common carriers by railroad are required by law to permit their freight cars to be interchanged to the rails of all connecting carriers. When cars of one line are on the tracks of another railroad, they are known as "foreign cars". When foreign railway cars are used by the plaintiff, they are hired or rented for such use and a compensation or rental is paid therefor by the plaintiff, while in operation on its line, and the cars so hired are used by the plaintiff as its own when so used. It is the duty of the plaintiff using cars so hired by it, both because of a contracted obligation and because of the unavoidable necessity of keeping cars in safe operating condition, to perform all necessary maintenance and running repairs required by such cars. The contract to perform maintenance and running repairs for cars so rented and used by operating carriers is expressed in the code of rules governing the condition and repair to freight and passenger cars for the interchange of traffic, adopted by the Associa- [fol. 119] tion of American Railroads, which rules are subscribed to by all railroad lines interchanging cars. Rule 1 of this code provides that the railroad is responsible for the condition of all cars on its line, and must give to all.

regardless of responsibility, equal care as to inspection, oiling, packing and running repairs.

All carriers using foreign cars pay to the car-owner per diem charges which are for reimbursement for interest on the investment, depreciation and cost of necessary repairs. When repairs are made to foreign cars by the operating railroad, the charge against the owner for reimbursement of the expense is an offset to the repair factor included in the basis for the per diem charge under which the owner assumes the expense of maintenance.

Cars, whether loaded or empty, having defects in violation of the Safety Appliance Acts, or the regulations of the Interstate Commerce Commission, may not be offered in interchange and cars in an unsafe condition or unsuitable for loading must be repaired on the line where such condition develops or is found to exist. The necessity for running repairs or for repairs necessary to enable the use of the car and its return to owning line, may result from normal wear or the completion of service life of a part which matures while the car is in possession of the operating carrier, or may result from accidental breakage or negligent handling of the car by the carriers making use thereof. In some cases, breakage or damage to the car may be due to a fault of the operating carrier, in which case the cost of repair is an expense properly chargeable to and borne by the operating carrier. The operating carrier making ordinary running repairs, or repairs necessary to enable the car to be safely operated, where damage to the car is not the result of the operating carrier's negligence, bills the owner of the car for actual cost of repairs and is reimbursed for such cost by [fol. 120] the owner of the car. The obligation to make such repairs to foreign line cars while in plaintiff's possession is imposed upon plaintiff by the requirements of the Federal Safety Appliance Acts, the rules and regulations of the Interstate Commerce Commission, the general interchange agreement of the Association of American Railroads and plaintiff's legal duty to the shipping public to function efficiently as a common carrier.

Materials and supplies for foreign car repairs are purchased, accounted for and used in the same manner as like materials purchased for the repair of plaintiff's cars, and railroad operating capital is likewise used for the purchase of such materials, subject to reimbursement by the owner of the car for those repairs chargeable to the owner and not

borne by the operating line. Foreign cars are used by the plaintiff for its purposes in inseparably carrying on intrastate, interstate and foreign commerce in the same manner as its own cars are used, and plaintiff's cars are subject to interchange with all foreign railroads in the same manner as foreign cars are interchanged to plaintiff's line.

42. Exclusive of the purchases of tangible personal property made by plaintiff for its own uses and in addition to the quantities hereinbefore described, upon which defendants claim the right to levy the tax in question, certain purchases of tangible personal property are made by or for plaintiff's subsidiary railroad companies in the following circumstances:

The Northwestern Pacific Railroad Company and the San Diego & Arizona Eastern Railway Company are wholly owned subsidiaries of Southern Pacific Company and, while nominally separate organizations, they are in many respects subject to the common management and control of Southern Pacific Company. Some of the officers and directors are common to all three of said companies. Said subsidiary [fol. 121] companies cooperate closely with the parent company in furtherance of the parent company's transportation business.

Each of these companies is a railroad engaged in the handling inseparably of intrastate, interstate and foreign transportation and commerce, and each of these railroads interchanges all classes of commerce with the Southern Pacific Company. Each of said railroads serves as a feeder line to and from plaintiff's lines of railroad. Each of these railroads reaches ports and points of interchange with carriers handling interstate and foreign commerce. Each of these railroads operates in the performance of transportation services in the same manner as plaintiff's operations are described in this stipulation, excepting as to the physical and geographical location of the lines of railroad.

Each of said lines of railroad has its own separate store department and places of storage and means of distribution of materials and supplies on its own lines, and handles and distributes all tangible personal property used by it in the performance of transportation on its own lines.

The several methods of purchasing tangible personal property for said subsidiary companies are described as follows:

(a) The purchasing agent of each company makes certain purchases respectively in the name of said company, and all such purchases are delivered directly to said company at places on its lines and do not come into the possession of the plaintiff excepting as plaintiff may handle the same as a carrier in the process of transportation and delivery to said company as consignee. The purchases so made do not include any property which is not purchased in carload quantities. Taxes on account of the storage, use or other consumption of the materials described in this paragraph by said subsidiary lines are not sought to be enjoined in this proceeding.

[fol. 122] (b) In addition to property purchased in the manner above described, Southern Pacific Company purchases in its own name for its said subsidiary lines, certain materials to be used respectively by its subsidiary lines, which are purchased in carload lots and delivered respectively to said subsidiary lines in carload lots and said materials do not go into the possession of Southern Pacific Company for any purpose excepting as same may be handled by Southern Pacific Company as carrier thereof in the process of transportation and delivery of the same respectively to said subsidiary lines. Such purchases are originally made by the use of railway operating capital of Southern Pacific Company, which operating capital is reimbursed out of railway operating capital of the subsidiary company for which such purchases are made, and no part of such expenses or cost of such materials and supplies is ever charged to any other industry, business or activity of the plaintiff or of either of said subsidiary companies. Taxes on account of the storage, use or other consumption of the materials described in this paragraph by said subsidiary lines are not sought to be enjoined in this proceeding.

(c) In addition to tangible personal property purchased for said subsidiary companies in the manner hereinbefore described, Southern Pacific Company purchases in interstate commerce certain materials and supplies (hereinafter specified) in limited quantities or in less than carload lots. Such purchases are made in the name of Southern Pacific Company for use by said subsidiaries respectively and are made in the same manner as Southern Pacific Company makes purchases for its own use and Southern Pacific Company is reimbursed for the full cost of making such pur-

chases and handling and delivering the same to said subsidiary companies. Such purchases are originally made by the use of railway operating capital of Southern Pacific Company, which railway operating capital is reimbursed out of railway operating capital of the subsidiary com- [fol. 123] pany for which such purchases are made and no part of such expense or the cost of said materials and supplies is ever charged to any other industry, business or activity of the plaintiff or of either of said subsidiary companies.

The following are all of the items which are specified in the bill of complaint and Exhibit "B" and which are purchased in the manner described in this part (c) above, to-wit:

Air brake parts, steel blooms, bolts and nuts, stay bolts, journal boxes, burners and lamps, car heating parts, car lighting parts, carbide, miscellaneous castings, steel chain, wire cloth, conduit, sheet copper, bell cord, cotters, couplers, seat coverings, retard devices, steel trap doors, electrical parts, feed water heater parts, copper flue ferrules, miscellaneous forgings, plug fuses, gaskets, McBeth glass, dust guards, headlight parts, air brake hose, steam hose, injector parts, boiler insulation, bar iron, flyer iron, stay bolt iron, McLaughlin joints, tail lamps, sash locks, lubricator parts, knuckles, common wire nails, metallic packing, priming paint, pantosote, sheathing paper, taper pins, plates and sheets, porous plugs, bull rings, brass rods, train battery separators, sheet steel, asbestos tape, torches, copper tubing, steel tubing, gate valves, globe valves, pressure valves, lock washers, wrot washers, graphite, driving journal grease, valve oil, colored cotton waste, journal box waste, terminal blocks, dry and condulet cells, channel pins, fibre end posts, battery renewals, copper wire, galvanized wire, iron wire, axes, hack saw blades, chisels, twist drills, files, wheel and coupler gauges, light globe guards, hammers, air tool hose, journal jacks, reamers, riveting hammer parts, saws, tube expanders, tool steel, taps, grinding wheels, wrenches, track drill bits, track chisels, shank drills, ballast forks, track jacks, motor car parts, track picks, cross cut saws, track shovels, spark plugs, measuring tape, car clean- [fol. 124] ing brushes, bunting, signal lamp burners, brake clubs, bell cord, crayons, fuses and torpedoes, lantern

globes, mop heads, water hose, inspectors lanterns, sponges, baggage truck wheels, burlap, brass wire cloth, iron wire cloth, steel cloth, water hose, piling, black iron pipe, pipe fittings, galvanized iron pipe, round point shovels, stringers, washers.

Typical of such items of materials and supplies which are purchased in the name of Southern Pacific Company, for use by said subsidiaries as a purchasing agency respectively for said subsidiary companies, in the manner last described, is air brake hose. Air brake hose is put up in bundles or bales. Estimates for requirements of air brake hose for all three of said companies are respectively made by each of said companies and the estimated requirements for each three months' period are given to the purchasing agent of Southern Pacific Company. Said purchasing agent places the order therefor, purchases being made on single orders and usually for carload quantities. Shipments of such material are made to the store department of Southern Pacific Company and the required number of bundles or bales ordered for Southern Pacific Company is disposed of and handled in the manner hereinbefore described for the handling of Southern Pacific Company's materials and supplies. The remaining number of bundles or bales of air brake hose purchased for each of said subsidiary companies is held by said store department for such time as may be incidental to the reloading and transportation thereof to said subsidiary company. When said air brake hose is transported and delivered to either of said subsidiary companies, it is used in the operation of said railroad as a common carrier of intrastate, interstate and foreign commerce.

For accounting purposes, transfer requisitions are made to cover all such materials purchased for subsidiary companies and charges are made against said subsidiary com-[fol. 125] panies for reimbursement of such cost of materials and purchasing expense. The procedure followed with respect to the handling of air brake hose, as above described, is followed in the handling of all of the tangible personal property hereinbefore itemized. All of said items so purchased for said subsidiary companies are purchased for use in and are actually used in conducting the transportation business of said subsidiary railroad companies in inseparably intermingled intrastate, interstate and foreign commerce.

Only that part of said items which are purchased by Southern Pacific Company for its own separate uses are included in the property on account of which defendants claim use taxes as aforesaid. Taxes on account of the storage, use or other consumption of the materials described in this paragraph by said subsidiary lines are not sought to be enjoined in this proceeding.

43. As an exception to the facts hereinbefore stated, ties out of plaintiff's reserve or stand-by supply of ties, have been sold to Western Pacific Railroad Company in the following circumstances: on occasions when said railroad company has been in urgent need of a small supply of ties and has requested the same of plaintiff, plaintiff has sold to Western Pacific Railroad Company, such small amount of ties as would not materially diminish its reserve supply thereof. Such sales have not at any time amounted to in excess of one-tenth of one per cent of plaintiff's regular reserve supply of ties. Upon such a sale being made, a sufficient quantity of ties is included in plaintiff's next purchase of ties to make up such depletion of its reserve supply. An accommodation of this character is only made in some exceptional emergency and such sales are of extremely rare occurrence. Similar sales of some other material or repair part may have been made to some railroad company other than plaintiff's subsidiary railroads in some exceptional emergency.

44. By reason of its inextricably intermingled interstate, [fol. 126] foreign and intrastate commerce and business, plaintiff is compelled to purchase from points outside of California and to use and consume a greater amount of tangible personal property than it would be required to purchase if it were engaged only in intrastate railroad transportation business.

45. Notwithstanding that none of the property aforesaid was, is or will be used exclusively and separately by the plaintiff in conducting intrastate transportation business, but that all of it is used as hereinbefore stated, defendants have demanded of the plaintiff the taxes aforesaid under the provisions of Ruling No. 11 of the defendant, said State Board of Equalization, promulgated on or about February 6, 1936, which said ruling is as follows:

"The fact that tangible personal property is purchased in interstate or foreign commerce does not exempt from the tax the storage, use or other consumption of such property in this State after the shipment of the property in interstate or foreign commerce has ended.

"The fact that tangible personal property is used in this State in interstate or foreign commerce following its storage in this State does not exempt the storage of the property from the tax. The tax does not apply to the use or storage of property purchased for use in interstate or foreign commerce and actually placed in use in interstate or foreign commerce prior to its entry into this State."

46. It is understood that in making this stipulation of evidential facts, defendants do not stipulate as an ultimate fact that the materials involved herein were in interstate use in plaintiff's railroad operation in conducting transportation prior to their physical installation in plaintiff's railroad and/or consumption in conducting transportation, it being expressly understood that the time when interstate [fols. 127-129] use commenced is a matter of ultimate fact or mixed conclusion of law and fact to be made by the court.

It is further understood by and between the parties hereto that this stipulation is a stipulation of facts only, and that neither party hereto is stipulating to conclusions of law, and that both parties hereto are entitled to draw such inferences from the facts herein stipulated, or such conclusions of law, as they may be so advised.

Dated: December 20th, 1937.

Guy V. Shoup, Harry H. McElroy, Attorneys for Plaintiff. U. S. Webb, Attorney General; H. H. Linney, Deputy, by James J. Arditto, Deputy Attorney General, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 130] In United States District Court, Northern District of California

In Equity. No. 4055-R

Southern Pacific Company, a Corporation, Plaintiff,

v.

John D. Corbett, Fred E. Stewart, Richard E. Collins, Ray L. Edgar, and Harry B. Riley, as Members of the State Board of Equalization of the State of California; State Board of Equalization of the State of California, and U. S. Webb, the Attorney General of the State of California, Defendants

Before Denman, Circuit Judge, and St. Sure and Roche, District Judges

Opinion—Filed May 3, 1938

Denman, Circuit Judge:

This case has been submitted under an agreed statement of facts which sustains the pertinent allegations of the bill discussed in our opinion denying the motion for its dismissal. 20 Fed. Supp. 940. The railway has established [fol. 131] that the storage use of the railway materials, solely for its current repairs and renewals and necessary extensions of its intermingled interstate and intrastate enterprise and plant, and without which usage the railways would stop running, is a use in interstate commerce. Hence a tax upon such use is a tax affecting an interstate commerce use—that is, affecting the federal as distinguished from any state function performed by the railway as a public carrier. At the hearing we invited further argument and briefing, but the able presentation on behalf of the State has not answered the question, "In what enterprise other than the intercommingled interstate and intrastate railroading is this use in storage for current repairs and replacements, without which the railroad could not operate?" Such storage use for current installation is use in interstate commerce in any realistic sense understood by industrialists and merchants, (20 Fed. Supp. 943), and could be regarded otherwise only by the application of some "artificial standard" prohibited by Gregg Dyeing Co. v. Query, 286 U. S. 472, 480.

However, since our denial of the motion to dismiss, the Supreme Court has decided three cases dealing with the boundaries of state and federal taxation. Two of them, Western Live Stock v. Bureau of Revenue, 82 L. ed. 548, and Coverdale v. Arkansas & Louisiana Pipe Line Co., decided April 4, 1938, significantly expand the area of the states. A third, Helvering v. Mountain Producers Corp., 82 L. ed. 607, explicitly overrules long established concepts determining the respective taxing areas of both governments.
[fol. 132] It is suggested by the state's officers that since the thirteenth paragraph of that decision states:

"* * * In the light of the expanding needs of the State and Nation, the inquiry has been pressed whether this conclusion has adequate basis; whether in a case where the tax is not laid upon the leases as such, or upon the government's property or interest, but is imposed upon the gains of the lessee, like that laid upon others engaged in similar business enterprises, there is in truth such a direct and substantial interference with the performance of the government's obligation as to require immunity for the lessee's income."

Helvering v. Mountain Producers Corporation, 82 L. ed. 607, 611,

we may be required to reconsider our decision with a view to the expanding needs for revenue of the State of California, and they offer the enactment of the use tax itself as evidence of such need.

In the present emergency of dependent unemployed, California's need for revenue is of sufficient pressure to produce incandescence, but the emitted light does not show where the path of such a principle of determination will lead us.

What light we have on various interstate railways, performing a National public service as important in the body politic as the circulation of blood in the individual, seems to disclose correspondingly "expanding needs" for revenue to meet their expanding payrolls and interest on debt and, here, expanding taxes. Indeed, so pressing are their needs that only by the expanding use of federal funds is their federally regulated function prevented from transfer to federal courts and federal receivers. Already, for many [fol. 133] railways, it has been transferred.

We cannot believe that the language of the Mountain Producers case must be interpreted as imposing on us, first, a determination of the need for state taxation, and, if found, second, a reconsideration of our decision on the denial of the motion to dismiss with a view to a reversal of our holding there. Such a criterion would suggest another review and other overrulings if returning prosperity contracts rather than expands the state's need.

We prefer the alternative view of the state's brief that, just as the emergency of the depression and high rentals in the so-called Rent Cases, Block v. Hirsh, 256 U. S. 135; Marcus Brown Holding Co. v. Feldman, 256 U. S. 170, and Edgar A. Levy Leasing Co. v. Siegel, 258 U. S. 242, and also in the much later case of Home Building and Loan Asso. v. Blaisdell, 290 U. S. 398, induced the Congress and the Judiciary to the exploration of hitherto unused constitutional powers, so now the urgency of the more recently expanding functions of government in aid of the economic and social needs of the average man, also made poignantly clear by the world depression, requires both legislatures and courts to review the border line between state and federal taxing areas, as that was decided in cases when no such economic and social conditions existed or had been exposed.

Prior decisions considered in the overrulings by the Mountain Producers case present a more definite guide for determining its effect on the decision of this case. Among the cases considered is Indian Oil Co. v. Oklahoma, 240 U. S. [fol. 134] 522, holding invalid as an unconstitutional burden on a governmental function a tax on Indian land leases owned by the taxpayer. Here the tax was on the property itself of the taxpayer.

In three other cases, the income of the taxpayer from his leases is held not taxable. In Choctaw & Gulf R. R. v. Harrison, 253 U. S. 292, was held invalid a state tax on the lessee of a mine from the trustee of the mine for Choctaw and Chickasaw Indian tribes, wards of the federal government, based upon his gross sales of his coal. The court held that the lessee was "the instrumentality through which this (governmental) obligation is carried into effect". Such an agency cannot be subjected to an occupation or privilege tax by a state".

In Gillespie v. Oklahoma, 257 U. S. 501, the state tax on the income of leases owned by the taxpayer was held in-

valid on the same reasoning, as was the federal tax on the income of the owner of state leases in Burnet v. Coronado Oil & Gas Co., 285 U. S. 393.

In all these cases the tax on the taxpayer's property or his income incidental to its ownership is regarded as potentially destructive of the governmental function served by the taxpayer in the exercise of its ownership.

In the Mountain Producers case the tax was upon the income from the leases, and the court states the overruling principle to be:

"* * * And where it merely appears that one operating under a government contract or lease is subjected to a tax with respect to his profits on the same basis as others who are engaged in similar businesses, there is no sufficient [fol. 135] ground for holding that the effect upon the government is other than indirect and remote. We are convinced that the rulings in Gillespie v. Oklahoma, 257 U. S. 501, 66 L. ed. 338, 42 S. Ct. 171, supra, and Burnet v. Coronado Oil & Gas Co. 285 U. S. 393, 76 L. ed. 815, 52 S. Ct. 443, supra, are out of harmony with correct principle and accordingly they should be, and they now are, overruled."

Helvering v. Mountain Producers, supra, 613.

However, preceding this sentence regarding taxation on such income is another stating the broader principle permitting taxation on property of private persons, formerly regarded as having the character of governmental agents because of their leases or contracts with the government. This statement is so significantly joined by the word "and" to the succeeding above quoted sentence, that we are constrained to believe it to be the broader ratio decidendi of the case. The preceding sentence is (pp. 612, 613):

"These decisions in a variety of applications enforce what we deem to be the controlling view—that immunity from non-discriminatory taxation sought by a private person for *his property* or gains because he is engaged in operations under a government contract or lease cannot be supported by merely theoretical conceptions of interference with the functions of government. Regard must be had to substance and direct effect." (Emphasis supplied.)

If, then, the private person dealing with the federal government with reference to his property is subject to state

taxation, an occupation tax on that person in the use of his property would seem equally valid.

If this be so, the principle established is inconsistent with that controlling in Graves v. Texas Co., 298 U. S. 393, 401, cited by the Railway as controlling here. There a con- [fol. 136] tractor agreed to sell gasoline to the government. It was his property until delivery to the government. Prior to delivery it had to be stored and withdrawn from storage. He was taxed by the state of Alabama for this use of storage and withdrawal while still his property.

The court in the Graves case states that this tax increases the government's cost by the amount of the tax levy. However, it seems clear that because the increased cost is so measurable, the principle is no different from the sales tax on the coal in the Choctaw case. It is just as certain that the government will receive less for the coal lease as that it will pay more for the gasoline. One is no more direct than the other. Both are levied on the owners of gasoline and coal while the government has no title in either.

Shortly before the Mountain Producers decision was that in Western Live Stock v. Bureau of Revenue, 82 L. ed. 548. There a non-discriminatory tax on gross receipts from the sale of advertising in a periodical printed in one state and circulated in that and in other states is held valid as on an intrastate activity. The fact that it increases the cost of producing advertising, which has its value because of its interstate circulation, is not controlling.

The latest of these tax cases, decided April 4, 1938, follows normally the trend of these decisions. In Coverdale v. Arkansas & Louisiana Pipe Line Co., the party taxed was engaged in the interstate delivery of petroleum gas through a pipe line. It maintained several pumps in the state of [fol. 137] Louisiana, the power from which traveled interstate with the gas it moved. The state levied an occupation tax on the use of the pumps, measured by the amount of power going into an intermingled intra and interstate distribution. The court held that because (1) the tax was non-discriminatory and (2) the pump itself was stationary within the state and itself did not move with the power it created, the tax on its use did not have a direct effect on interstate commerce and hence was a valid exercise of the state's right to tax.

When California's use tax on the Railroad is considered

in connection with the principles established in the preceding cases, we are compelled to the conclusion that the reasoning on which we distinguished it from the cases of Nashville etc. Ry. v. Wallace, 288 U. S. 249, and Edelman v. Boeing Air Transport Co., 289 U. S. 249, is not controlling. It is true that the standby material here stored for the necessary maintenance of a great interstate railway is dedicated to an interstate use, but so are the pumps in the Coverdale case. Railways could not run unless their spare parts and maintenance supplies were used in the storage from which they were currently drawn, but neither could the gas and oil be driven in interstate commerce unless the owner used the pumps.

For the purposes of this case the dividing line is the same as in the Nashville and Edelman cases, even though in those cases there was no proof that the fuel was dedicated to an exclusive use to create power in interstate transportation. It is that the storage use and withdrawal use are prior to the actual installation of the parts and rails in the locomo- [fol. 138] tive and cars and in the roadbed. Until then the increased cost, although it is paid by the passengers and freight owners, is an "*indirect*" burden on interstate commerce. Did not the Coverdale case seek to distinguish between the Nashville and Edelman cases and Holson v. Kentucky, 279 U. S. 345, we should be inclined to hold that the latter case was overruled and, though a direct burden, the tax was as valid as the direct ad valorem tax on the railroad's property itself. In logic, as pointed out by Mr. Justice Stone in his concurrence in the Helson case, the one is as justifiable a method of collecting from the railway what it owes the state government for its services in state governmental protection, as is the other.

We find the facts to be as stipulated and agreed by the parties. From those facts we conclude that the threatened enforcement of the California Use Tax Act will not impose a direct or undue burden on plaintiff's interstate commerce business.

The permanent injunction is denied and the bill dismissed.

William Denman, United States Circuit Judge.
Michael J. Roche, United States District Judge.
A. F. St. Sure, United States District Judge.

May 3, 1938.

[File endorsement omitted.]

[fol. 139] IN UNITED STATES DISTRICT COURT

[Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW PROPOSED BY DEFENDANTS—Filed June 6, 1938

This case came on for hearing on defendants' motion to dismiss the bill of complaint and to dissolve the interlocutory injunction issued herein, and on plaintiff's application for a permanent injunction. Notice of hearing of plaintiff's application for a permanent injunction was duly given in [fol. 140] accordance with section 266 of the Judicial Code (United States Code, Title 28, sec. 380). The plaintiff appeared by its counsel, Harry H. McElroy and Guy V. Shoup, Esq., and defendants appeared by U. S. Webb, Attorney General of the State of California, by H. H. Linney and James J. Arditto, Deputies Attorney General. The court having heard the parties and their counsel, and having considered plaintiff's verified bill of complaint and defendants' answer and motion to dismiss the bill of complaint and to dissolve the interlocutory injunction and plaintiff's application for a permanent injunction, and having rendered its opinion that plaintiff's application for a permanent injunction should be denied and the bill of complaint dismissed, makes the following findings of fact and conclusions of law, which constitute the grounds of its order denying to plaintiff a permanent injunction herein and dismissing the bill of complaint, as follows:

Findings of Fact

The Court makes the following findings of fact from the allegations of the bill of complaint which are expressly admitted by the answer and proceedings substituting defendants:

1. Plaintiff is, and at all times hereinafter mentioned has been, a corporation duly organized and existing under and by virtue of the laws of the State of Kentucky, and a citizen and a resident of said State of Kentucky. Plaintiff now is, and at all times herein mentioned has been, engaged in the operation, as a common carrier in interstate commerce, of lines of railroad, situated in the States of Oregon, California, Nevada, Utah, Arizona, Texas and New Mexico, and in the transportation of passengers and property from, to and

between points in each and all of said states, and at all times herein mentioned plaintiff, as such interstate common carrier by railroad, has been and now is subject to the provisions of the Act of Congress, approved February 4, 1887, [fol. 141] and acts amendatory thereof and supplementary thereto, known as the Interstate Commerce Act.

2. At the time of the commencement of this action the defendants John C. Corbett, Fred E. Stewart, Richard E. Collins, Ray L. Edgar and Ray L. Riley, were citizens and residents of the State of California, and said persons constituted the State Board of Equalization of the State of California at the time of the filing of this action. The defendant Harry B. Riley has been duly substituted herein in place of defendant Ray L. Riley, and the defendant William G. Bonelli has been duly substituted as a defendant in place of Ray L. Edgar, by orders of this Court, and each of said substituted defendants is a resident of the State of California and now a duly qualified and acting member of the State Board of Equalization of the State of California, and the appearance of each of said defendants has been duly entered herein.

3. At all times pertinent to this action the defendant, State Board of Equalization of the State of California, was and now is, an official board, organized and existing under and by virtue of the constitution and laws of the State of California, consisting of the persons named and described in the foregoing paragraph.

4. The defendant, U. S. Webb, is a citizen and resident of the State of California, residing in the City of San Francisco, and is the duly elected, qualified and acting Attorney General of the State of California and was so acting at all times pertinent to this action.

5. The tax complained of in this case is provided for in an act of the State of California entitled:

"An act imposing an excise tax on the storage, use or other consumption in this State of tangible personal property, providing for the registration of retailers, providing for the levying, assessing, collecting, paying and disposing of such [fol. 142] tax, making an appropriation for the administration hereof, prescribing penalties for violations of the provisions hereof and providing that this act shall take effect immediately."

Said Act, Chapter 361 Statutes of 1935, was approved by the Governor of the State of California, June 25, 1935, and at all times pertinent to the issues in this case has been in full force and effect. The copy attached to the bill of complaint is a true copy thereof.

6. The only remedial procedure prescribed and permitted by said Act at the time of the commencement of this action for the recovery of taxes paid or which may be paid by the plaintiff under said Act, was to make payment of such taxes under protest and bring an action for the recovery thereof within a short period of limitation, to wit: 60 days following the payment thereof, against the State Treasurer of the State of California, in a court of competent jurisdiction in the County of Sacramento, for the recovery of the amount of taxes paid under protest: that a court of competent jurisdiction in the County of Sacramento is a state court of competent jurisdiction, being the Superior Court of said county; that such provision of the Act is not intended to provide for an action in a federal court.

7. The damages and injury which plaintiff would sustain by reason of said statute if the enforcement thereof in the particulars complained of be not restrained (in the event the imposition of the tax complained of is held to be unconstitutional) are and would be great and irreparable, and the enforcement of collection of the taxes involved herein and claimed to be due from the plaintiff, and which would become due according to the terms of said statute, and the interpretations thereof by the defendants, and the claims for taxes asserted by said defendants against the plaintiff, would continue to run to large amounts and impose upon the plaintiff much accounting work and expense in connection with making returns and payments of said taxes; and by reason [fol. 143] of penalty provisions of the said taxing act plaintiff cannot safely disregard the same and await suits for the collection of said taxes for the purpose of testing the validity thereof because large amounts of penalities would accrue and continue to accrue if such course were followed; and the purported remedy prescribed by said taxing act of payment of taxes under protest and suit to recover the same, being the only remedy allowed to the plaintiff under the terms of said act, would not and does not provide a prompt, speedy and adequate remedy at law because the purported remedy prescribed and directed in said statute

is not a plain and certain remedy, is not a prompt and complete remedy, would not result in compensating plaintiff in full for all of the damages, losses and expenses which would be suffered by it, and would result in a multiplicity of actions.

8. Plaintiff's main lines of railroad extend from San Francisco, California, to Portland, Oregon; from San Francisco, California, to Ogden, Utah, and also from San Francisco, southeast to Los Angeles, California, and thence via Yuma and Tucson, Arizona, to El Paso, Texas, and thence to Tucumcari, New Mexico. At each of said points as well as at numerous other points, plaintiff's lines connect with the lines of other interstate carriers and thus enter into and become a part of through routes of transportation of freight and passengers between all points of the United States, and to and from adjacent foreign countries. In addition to said main lines the plaintiff's transportation system consists of numerous branch lines extending therefrom. The miles of road operated at the close of the year 1935, as reported to the Interstate Commerce Commission in Southern Pacific Company Annual Report, Table 412, was: total mileage (single track) Pacific Lines, 8783.45 miles, and for the State of California, 4,361.88 miles. The gross operating revenue of the Southern Pacific Company (Pacific Lines) for the year ended December 31, 1935, was $124,040,113.00, and that [fol. 144] part thereof applicable to the State of California was $63,508,423.00. At the time complaint was filed, the said figures were the last available for a full year of operation. The gross operating revenue aforesaid applicable to the State of California which was applicable respectively to interstate and intrastate operations, so far as the same could be allocated, and as reported by the plaintiff to the Railroad Commission of the State of California, was as follows: intrastate commerce, $26,926,287.00; interstate commerce, $34,-988,335.00. The seat of general management in the operation of said railroad is located at the City of San Francisco in California, and large quantities of materials and supplies and the aforesaid items of property are purchased for use in the conduct of its business as a carrier within the State of California and elsewhere. Some of the materials and supplies and other articles of tangible personal property aforesaid are used in connection with certain overhead operations carried on and performed within the State of California for

the benefit, and in connection with, the operations of the entire interstate railroad system so operated by the plaintiff because of the fact that general offices for the entire system are located within the State of California and certain general repair and maintenance shops and purchasing agents and stores for the purchase and distribution of supplies are located and operated for the use of said entire railway system at places within the State of California.

9. Under said Act, said defendants and each of them claim that there is due and payable by said plaintiff, taxes on all plaintiff's purchases of tangible personal property specifically described in plaintiff's Exhibits "A" and "B" of the Bill of Complaint, and subsequent purchases, and have demanded payment thereof, and if the plaintiff should fail or refuse to pay such taxes so demanded, said defendants [fol. 145] and each of them, intend and directly and expressly threaten and have threatened to, and unless restrained by the judgment or order of this court will, in pursuance of their said expressed intention, institute and cause to be instituted summary suits or other proceedings to compel the said payment of said tax, interest and penalties provided by said Act.

Defendants, and each of them, further threaten and have threatened in accordance with the procedure laid down in said Act, to cause summary process to be issued for the seizure and sale of personal property of plaintiff used by plaintiff as instrumentalities of interstate commerce in the necessary operation, maintenance and repair of said railroad, and thereby plaintiff's said business will be interfered with and the operation of its railroad will be interfered with to its great and irreparable damage in the sum of more than $40,000, and for which plaintiff has no adequate remedy at law; and defendants and each of them threaten to and will bring repeated suits against plaintiff for further quarterly installments of said tax and subject plaintiff to a multiplicity of suits and harassing litigation to plaintiff's great and irreparable damage.

10. The payment of said taxes would have required plaintiff to pay to the State Board of Equalization on or before July 15, 1936, the several large amounts of tax payment hereinbefore stated and to make additional payments on subsequent purchases, and to suffer the loss of use of such money and the earning value thereof until recovered by suit, if recoverable at all, and in order to comply with the require-

ments of the said taxing act and the demands of said defendants it would be or have been necessary for the plaintiff to incur substantial expenses in tax accounting and in keeping records of information concerning its purchases and the uses of such properties necessary to defend its rights against the imposition of such taxes and that it will be [fol. 146] necessary to continue such accounting unless it is relieved from the necessity so to do and to pay such taxes by the injunction sought in this proceeding, and such expenses and the damages aforesaid, if so incurred, would constitute a substantial and irreparable loss to the plaintiff.

In addition to the findings of fact based on the allegations of the bill of complaint which are expressly admitted by the answer, the Court makes the following findings of fact from the facts stipulated by the plaintiff and defendants:

Plaintiff's Railroad Operations

11. Whenever plaintiff's "railroad" or "railroad transportation plant" or "railroad operations" are hereinafter referred to in these findings, the same shall refer to and mean the plaintiff's railroad plant, facilities or railroad operations inseparably devoted to the service of intrastate, interstate and foreign transportation. Whenever the term "conducting transportation" is hereinafter used, it shall refer to conducting transportation inseparably in intrastate, interstate and foreign commerce. Hereafter the use of the present tense indicates a continuous course of action during all of the time material to the issues in this action.

12. Plaintiff's interstate and intrastate railroad system, described in the complaint, is inseparably and inextricably devoted to the services of intrastate, interstate and foreign transportation and commerce, the same rails, the same facilities, and the same organization being devoted to and used inseparably in plaintiff's said transportation enterprise. All branch lines of railroad forming a part of plaintiff's transportation plant within the State of California carry interstate transportation as well as intrastate transportation, and every part of said railway transportation plant is subject to interstate and foreign uses as well as intrastate [fol. 147] uses. The branch lines of railroad are feeder and distribution lines appurtenant to the main interstate lines and are an essential and useful part of plaintiff's railroad

plant in the handling of interstate and foreign commerce as well as intrastate commerce.

Purchases of Property by Plaintiff

13. In the necessary operation, maintenance and repair of plaintiff's railway transportation plant and the facilities and equipment thereof, plaintiff purchases large amounts of tangible personal property consisting of equipment, facilities, materials, supplies, shop machinery, tools, printed matter and publications, which property is described in the bill of complaint herein and in Exhibits "A" and "B" thereof, in accordance with the purposes, plans and methods hereinafter described, and in accordance with the purpose of doing and performing all of the acts and things with respect to said property, including holding and retention thereof in the State of California, which are hereinafter described. All of said purchases and the purchases hereafter to be made, which are pertinent to the issues of this case, were or will be purchases made in states other than California or in foreign countries and transported in foreign or interstate commerce into the State of California, for the uses and purposes hereinafter described. The tangible personal property described in the complaint represents typical classes of property purchased as hereinafter related, by plaintiff for its railway transportation purposes.

14. The total purchases of tangible personal property involved in this action and the taxes claimed to be due from the plaintiff on account thereof for each quarter to and in- [fol. 148] cluding the quarter ending September 30, 1937, are as follows:

Quarter Ending	Total Price of Tangible Personal Property	Tax Claimed To Be Due
June 30, 1936	$1,590,190.62	$47,705.72
Sept. 30, 1936	1,258,022.74	37,740.68
Dec. 31, 1936	1,429,470.82	42,884.12
Mar. 31, 1937	1,989,206.12	59,676.18
June 30, 1937	1,798,360.97	53,950.83
Sept. 30, 1937	1,861,558.70	55,846.76

Accounting

15. The purchases of all property for the operation, maintenance and repair of plaintiff's railroad were and are

made by the plaintiff through the use of its operating capital consisting of money or current assets definitely devoted to the service of transportation, or through the credit of said plaintiff as a railroad engaged in the service of transportation and upon the purchase of said materials and the payment therefor, the expenses therefor were and are in due course charged into the operating expenses of said carrier to the appropriate accounts for operation, maintenance or repairs, according to the accounting rules and regulations [fol. 149] prescribed for railroads engaged in interstate commerce under the provisions and requirements of the Interstate Commerce Act.

16. Southern Pacific Company, as a railroad common carrier engaged in interstate commerce, is and was subject to valuation by the Interstate Commerce Commission under the Interstate Commerce Act and its valuation for rate making purposes was made by the Interstate Commerce Commission and said valuation is duly reported in Volume 45 of Interstate Commerce Commission Valuation reports, Page 1 (Decided June 10, 1933). The working capital allowed by the Interstate Commerce Commission in plaintiff's said valuation, as of the dates of basic valuation of each property included therein, as shown by said valuation report, amounted to the total sum of $19,022,626.00. The amount of working capital allowed in said valuation was segregated as follows:

Account 708—Cash	$ 5,277,896.00
Account 716—Material and supplies	13,744,730.00
	$19,022,626.00

The amounts carried in accounts 708 and 716 in the company's balance sheets as of the dates of basic valuation and June 30, 1936, are as follows:

	As of Date of Basic Valuation	As of June 30, 1936
Acct. 708—Cash	$14,667,978.87	$15,525,583.40
Acct. 716—Material and Supplies	12,772,970.43	12,235,373.48
	$27,440,949.30	$27,760,956.88

The sum of $27,760,956.88, the amount of working capital as of June 30, 1936, is the approximate amount of working capital devoted to the service of transportation by the [fol. 150] plaintiff at the times pertinent to this action.

17. The accounting which is performed in connection with the purchase and distribution of materials and supplies used for the maintenance, repair and operation of the plaintiff's railroad, under accounting rules prescribed by the Interstate Commerce Commission, is in brief as follows:

Audited vouchers issued in payment of material and supplies purchased are charged to account 716—Material and Supplies, and are concurrently credited to account 760—Audited Accounts and wages payable.

When audited vouchers issued in payment for material and supplies are cashed by payees, the amount thereof is charged to account 760-Audited accounts and wages payable, and concurrently credited to account 708-Cash.

As material and supplies are issued for use in the maintenance and operation of the railroad, the value thereof is charged to account 531-Railway Operating Expenses (separately to each primary account applicable) and concurrently credited to account 716-Material and Supplies.

The uncashed audited vouchers outstanding (with exceptions not material here) remain in account 760 until paid and the debit balance in account 716 represents the amount of unapplied material and supplies remaining on hand.

18. Railroad materials and supplies are classified under the uniform classification of accounts for steam railroads prescribed by the Interstate Commerce Commission in accordance with section 20 of the Act to Regulate Commerce as "Material and Supplies" in Account No. 716, which reads as follows:

[fol. 151] "716. Material and Supplies

This account shall include in the balances representing the cost, less depreciation, if any, of all unapplied material, such as road and shop material, articles in process of manufacture by the accounting company, fuel, stationery, and dining car and other supplies. In determining the cost of material and supplies suitable allowances shall be made for any discounts allowed in the purchase thereof.

NOTE.—Balances representing the cost of unapplied construction material and supplies located at the point of use,

which have been purchased for projected new roads and extensions, are provided for in road and equipment account No. 47. 'Unapplied construction material and supplies' ".

"Unapplied material" means material purchased for specific intended use in the operation, maintenance and repair of the railroad and is carried in said Account 716 until actually placed or used for said purposes, and when actually placed and used said material is included in one of the accounts representing a disbursed expense.

The purchase price of property heretofore described was and is paid from working capital held as cash in banks for payment of current accounts and indebtedness incurred in the operation, maintenance and repair of the railroad and is known as Account 708 Cash, which reads as follows:

"708. Cash

This account shall include money, checks, sight drafts, and sight bills of exchange in the hands of the accounting company's financial officers and agents, or in transit from its agents and conductors for which such agents and conductors have received credit. It shall also include deposits with banks and trust companies subject to check."

All current expenses, including disbursements for the purchase of said materials and supplies are paid from said cash account 708.

Said working capital is necessary in the operation, maintenance and repair of the operating property of the said plaintiff.

[fol. 152] 19. Materials and supplies and working capital are classed in railway accounting practices, as prescribed by the Interstate Commerce Commission, as operative property, and the said working capital and materials and supplies carried in said accounts are and were at the times stated in the complaint a part of the operating property of the Southern Pacific Company. Additions and betterments to existing railway operating transportation plant are chargeable to the appropriate property accounts. Immediately upon the purchase of tangible personal property for railroad operation, maintenance and repairs of existing transportation plant, the same becomes and is subject to accounting in the manner and form hereinbefore described.

20. Taxes charged on account of the alleged storage, use or other consumption of the tangible personal property aforesaid under the California Use Tax Act of 1935, if required to be paid, would be a charge to and become a cost of conducting transportation in the same manner as other taxes against plaintiff's operating property are chargeable.

General Classes of Property Involved

21. The tangible personal property involved in this action is of two general classes: (a) property purchased to carry out a renewal or replacement of track, equipment, facilities, or structures in the existing transportation plant, which is also referred to as property purchased on specific orders; and (b) materials for current maintenance, or for use or consumption in conducting current operations, including stand-by materials. Both of these classes of materials are subject to a further classification as (a) materials [fol. 153] especially designed and manufactured upon approved specifications for railroad uses, (b) railroad materials manufactured upon plaintiff's particular specifications to meet its particular needs and purposes, and (c) general commercial materials.

22. The materials described as track materials, enumerated in plaintiff's Exhibit "A" (of complaint) are all materials especially designed for railroad uses and built according to approved specifications for such uses and are not practically adapted to any other uses. Some of such materials were especially manufactured to supply orders made by the plaintiff and to meet particular specifications as to quantities, quality, sizes and other characteristics defined in plaintiff's orders for such materials.

23. All property described as materials for maintenance of freight, passenger cars, locomotive and work equipment, shown by said Exhibit "B", is materials especially designed and constructed for railroad uses and purposes such as air brakes parts, crane parts, axles, bolts and nuts, booster parts, journal boxes, brakes, car wheels, burners and lamps, car heating parts, car lighting parts, miscellaneous castings, steel chain, cotters, couplers, cylinder parts, retard devices, steel trap doors, miscellaneous forgings, headlight parts, airbrake hose, steam hose, lubricator parts, boiler insulation, stay bolts, trail lamps, knuckles,

and all interchangeable parts for the repair of rolling stock and motive power and generally all parts for the repair of rolling stock, motive power, equipment, shop machinery and shop tools, excepting raw materials such as metal, cloth, wire, paper, glass, lumber, common wire nails, paint, oils, etc.

24. All of the materials described in Exhibit "B" as lubricants and waste for locomotives and cars such as graphite, driving journal grease, valve oil, locomotive and [fol. 154] journal box waste, are materials especially prepared for railroad purposes and uses. Such materials are manufactured to meet the common railroad specifications for such purposes.

25. All items of materials as shown by Exhibit "B" for maintenance of signal, telephone and power lines, are materials primarily manufactured for such uses and purposes. The materials, other than lines, for the maintenance of railway signal systems are especially designed for railroad uses and such materials are generally unfit for any other purposes.

26. Materials for maintenance and replacement of railway shop machinery and tools shown by Exhibit "B" are materials especially designed for such uses, but are suseptible of other uses. All repair parts for existing machinery are supplied upon particular specifications for usé in the repair of a particular article of machinery and such repair parts are generally unfit for other purposes.

27. All items described as track and roadway tools shown by Exhibit "B" are articles especially constructed on specifications for railroad uses, but are susceptible of other uses, and excepting common saws, picks, shovels and other common tools usually carried in mercantile stocks for general uses.

28. A considerable part of the items described as train, station, and yard supplies, shown by Exhibit "B", are especially designed for railroad uses but are susceptible of other uses. The exceptions are those items commonly carried in the stocks of goods of retail merchants for general purposes such as sponges, paper, water hose, crayons, mop heads, mantle, cloth and raw materials.

29. All items for repair and maintenance of bridges, buildings, water and fuel pumping plants, shown by Ex- [fol. 155] hibit "B", excepting raw materials and those articles commonly carried in retail stocks of goods, are materials especially designed for or suitable for railroad purposes but are susceptible of other uses. Steel work, parts for bridges, and bridge timbers are articles especially designed and prepared for the intended purposes and are usually constructed or manufactured according to particular specifications for plaintiff's particular uses, and are not economically susceptible to other than the intended use.

30. Railway stationery, blank forms, time tables, tickets, advertising, instruction books, books of rules and regulations and the like are especially manufactured and printed for plaintiff's railroad uses and purposes and are unfit for any other uses.

Purchasing and Handling of Property

31. As a matter of practical economy, all purchases made by the plaintiff of property for use in conducting transportation are restricted to the least practical quantities required for current operations, repairs and renewals. All purchases are made on the basis of estimates and requisitions to meet current requirements and such estimates are made by those persons in charge of operations and maintenance throughout the entire railroad system, to wit: Division Superintendents, Division Engineers, Department Heads and their subordinates. Upon such estimates being made and communicated to the management, the managing officers of such railroad give authority for the expenditures for all classes of such property and all purchases made for the Purchasing Department are based on such estimates and the authority for such expenditures.

32. The purchasing department of the railroad is a part of the operating personnel of the railroad and all of the [fol. 156] expenses of said department incurred in the purchasing of tangible personal property for railroad operations, maintenance, renewals and repairs are chargeable to railway operating expense.

33. The Storekeeper has charge of all railroad storehouses and material yards, and all such railroad storehouses and material yards are parts of railroad operating property

and all of the expenses thereof and of the Storekeeper and his department which are incurred in the handling and distribution of tangible personal property for the operation, maintenance, renewal and repair of the railroad operating transportation plant are ultimately charged to the same accounts in which cost of such materials are included. When carload lots are delivered to plaintiff at points outside of California, the shipment is either consigned to point of use for unloading directly at the job, if for repairs or renewals, or to point of distribution for operations, or made by transfer to work train, to the Store Department, supply cars, or may be unloaded at storehouses or material yards. When unloaded at any such destination, the unloading is performed by railway operating employes and at railway operating expense.

34. The Store Department keeps a record of all property received and distributed by it. Neither the Store Department nor any agent of the railroad receiving such property makes any use thereof, prior to its placement for installation or consumption, for any purpose other than to take custody thereof, make records thereof, sort, unpack or pack, break bulk, prepare, retain, handle or distribute the same and all detention and handling thereof at all times is on railroad operating property and at railroad operating expense.

35. All tangible personal property purchased as aforesaid is handled inbound, from the time the same reaches the [fol. 157] rails of the plaintiff, as company materials, on company material waybills and on free billing; and all of such property when received by plaintiff as purchaser and thereafter handled by the plaintiff in distribution over its lines of railroad, is likewise handled on free company billing, and the cost of all of such transportation over company rails is a charge to railway operating expense.

36. At the time of the order and shipment of all tangible personal property involved in this action from the interstate points of origin, plaintiff gave shipping directions specifying destination for the property either at plaintiff's points of installation, or at points of use such as terminals, shops, stations, or office buildings, or at points of distri-

bution such as material yards, roundhouses, stations or storehouses. Plaintiff maintains storehouses and storerooms and material yards and other places of storage along all of its lines of railroad at principal terminals, at division points or at stations. Such places for the holding and detention of railway materials and supplies are all a part of a unified distribution system.

Installation of Specific Order Materials, etc.

37. Specific order materials, supplies, etc., are purchased and handled in the following manner:

In order to perform deferred maintenance, to replace parts of main line track which had or was about to reach the end of its service life and in order to make provision for the safe operation of high speed trains, of which the new streamliner passenger trains are an illustration, plaintiff, in the year 1936, commenced the reconstruction of certain parts of its main lines of railroad. The materials described [fol. 158] in Exhibit "A" of the bill of complaint are materials which were purchased for the purpose of carrying out plaintiff's track renewal program in the year 1936. The necessity for such renewal program was ascertained prior to the year 1936 by inspection of the track, by experience in the life service of rail and ties and other materials in the railroad track which are subject to wear, and by reason of the determination to improve train schedules and to place in service certain passenger trains known as the streamliner trains to be operated on faster train schedules.

In accordance with the information so ascertained and the necessity for making such track renewals, the management of the railroad caused an investigation to be made concerning all the necessary track renewals and improvements in roadway for the purposes aforesaid, the necessity for the elimination and improvement of curvature, improvement of grades, the character and specification of the materials required, and required to be made an estimate of the cost of carrying out such program. The information prepared for the carrying out of such program included specific data, including the number of miles of new rail to be laid, the number of ties, frogs, switch points, bridge timbers or other bridge materials, spikes, bolts, nuts, tie plates, and an itemization of other materials which would be required,

such information constituting a complete specification of the work, to be performed.

Upon receipt of such data, the Department of Maintenance of Way and Purchasing Departments were called upon to estimate the cost of such proposed renewals and the resulting information and estimates, together with the basic data and specific recommendations of the local officials, including the General Manager, were then submitted to the President of plaintiff's railroad, who in turn submitted the [fol. 159] entire proposal to plaintiff's Board of Directors. The Board of Directors approved said program, and in order to carry it into fulfillment the purchasing agent of said railroad was required to secure bids for the purchase of said materials. Upon receiving satisfactory bids, orders were placed for the purchase of said materials at points outside the State of California. The greater part of such materials was manufactured for the express purpose of filling plaintiff's orders therefor and when ready for delivery by the sellers thereof to plaintiff, instructions were given for the transportation of said materials to points on plaintiff's railroad and over plaintiff's line of railroad to the several places of installation of said materials. Having information as to the dates of shipments and dates of expected arrival of said materials at such places of installation, gangs of workmen, known as "extra gangs" were assigned to the several points of installation in order that the materials would be installed in the railroad track with the utmost economy and dispatch. Said materials, including rails and ties, arrived at points of installation in carload lots and were unloaded from the cars upon the ground along the right of way at points of use and were installed by said extra gangs, all in accordance with the program theretofore made and outlined. The foregoing applies to the tangible personal property specifically described and set forth in Exhibit "A" of the bill of complaint.

As to similar property purchased by plaintiff, since the filing of said complaint and which will hereafter be purchased for use in California, to carry out track renewal programs, the procedure followed by plaintiff has been and will be substantially as follows:

In the fall of each year it is the custom and practice of plaintiff to follow the same procedure as above outlined with [fol. 160] regard to any substantial renewal or betterment

of its existing facilities. This annual renewal program is based upon estimates and recommendations of local officials and is included in the proposed budget which, if approved by the board of directors, follows the procedure above outlined with regard to the purchase and transportation into California and the installation of materials in California necessary to carry out the annual renewal program approved and authorized by plaintiff's board of directors.

All substantial repairs or renewals of railroad track, equipment, and the more important structures of the plaintiff's railroad transportation plant, insofar as the same deal with the purchase, transportation into the State of California, and installation of tangible personal property as a part of plaintiff's railroad facilities, are planned, programmed, authorized and completed in accordance with the hereinbefore described practice.

38. The track materials aforesaid were held or retained by plaintiff after the termination of their shipment to California by such delivery to the place of installation and before their installation in plaintiff's railroad for varying periods of time, the extent of such periods depending upon plaintiff's convenience, the stage of preparation for the installation thereof at the time of the arrival thereof at the point of distribution or installation, or other circumstances incidental to plaintiff's operations. The period of time between the termination of the shipments to California and the installation of the materials was no longer than was required for the convenient and effective installation thereof. The unloading, handling, retention and installation of such track materials were accomplished by railway employees and such installation, when accomplished, constituted a renewal or replacement of a part of the existing [fol. 161] railway operating plant and became immediately a part thereof.

39. Materials for replacement or renewals of major structures such as buildings and bridges were and are handled in the same manner as above related, excepting articles required in less than carload lots, which are usually handled in the same manner as materials and supplies for current operations and maintenance.

40. Materials and supplies, equipment, tools or parts which are ordered to fill special requirements are delivered

directly to the department making advance requisition therefor, and are not detained or held in any manner except such as is incidental to transportation to the place of installation or that which is incidental to such installation.

Stand-By Facilities, etc.

41. In the interest of prompt and efficient public service and in the performance and discharge of its obligations to the public as a common carrier by railroad, plaintiff is required and compelled to have supplies and facilities to meet current requirements distributed over its entire line of railroad in quantities and at the times necessary to anticipate regular current requirements, and to have such reserves in quantities necessary to meet constantly fluctuating demands and emergencies which result from changes in the volume of business handled, traffic accidents, wrecks, weather conditions, washouts, and unforeseen operating conditions which commonly affect a railroad, and to meet the ordinary wear and tear which occur in connection with the use of its railroad and facilities.

[fol. 162] Receipt, Distribution and Maintenance of Stand-By Materials

42. After the termination of the interstate shipment of stand-by materials and facilities, and upon their arrival at their places of destination on plaintiff's lines, the same are unloaded by plaintiff's employes directly to material yards, storehouses, shops, or other places maintained by the plaintiff as a part of its operating facilities for the detention of stand-by materials and supplies and plaintiff retains and holds them at such places as stated in the next paragraph.

43. Plaintiff retains and holds and keeps on hand in space provided by it in the State of California at strategic points along its lines of railroad—i.e., at points suitable for prompt distribution of stand-by facilities and materials as needed—over its entire system of lines.

44. The distribution by plaintiff of stand-by materials and facilities to stores located at the points along its lines of railroad aforesaid and the holding of such stand-by facilities at such places is necessary to insure the rendition by plaintiff as economically, efficiently and as free from interruption as possible of its interstate and intrastate railway transportation services.

Installation of Stand-By Facilities

45. When repairs become necessary to any part of plaintiff's railroad transportation plant or to any of the equipment or facilities thereof, plaintiff's employes who are charged with making such repairs take out or secure delivery to them from plaintiff's nearest place of detention thereof, such stand-by materials or facilities as are necessary to make such repairs.

When materials and supplies for current renewals, repairs or consumption are received at general stores in car-[fol. 163] load lots and such carload quantities are required at other points of use along the railroad, some part of such materials may be immediately reconsigned to such points of ultimate use, it being the practice of the plaintiff to distribute, as far as is practicable to do so, stand-by materials, supplies and facilities to most convenient points of distribution and as nearly as possible to the places of ultimate use thereof.

46. Between the time when stand-by facilities or stand-by renewal parts or materials are taken from plaintiff's stores or material yards, as above described, and the time when such articles are available as physically connected parts of plaintiff's railway transportation plant or of the equipment or facilities thereof, for carrying on interstate and intrastate transportation, time intervals occur during which such articles of property are retained or held in the possession of the plaintiff and are not in motion in the course of installation thereof, such time intervals being such as necessarily occur in the transportation thereof to the places of installation and such as occur when such articles or parts are set down at the places where they are to be physically connected with plaintiff's railway plant or facilities or equipment thereof, and before further movement or handling thereof in the course of actual installation can proceed. After such articles are taken from plaintiff's stores or material yards or other places of detention as above described, there is no retention or holding of any of said facilities, except such as necessarily occurs in the ordinary and efficient course of transporting said facilities to their ultimate destination and installing them as physically connected parts of plaintiff's railway transportation plant or the facilities or equipment thereof.

47. There is no holding in any warehouse, storeroom or [fol. 164] other like place of deposit, of any of the specific order property for renewals or replacements hereinbefore described, after the termination of the interstate shipment and the plaintiff's receipt thereof; however, time intervals during which such tangible personal property is retained or held in the possession of the plaintiff, and is not in motion in the course of installation thereof, occur between the time of termination of the interstate shipment thereof and the time when the installation of such tangible personal property is completed and the same is available as a physically connected part of plaintiff's railroad transportation plant for carrying foreign, interstate and intrastate transportation and commerce; said intervals being such as occur when such repairs or renewal parts are set down at the places where renewals or replacements are to be made and before further movement or handling thereof in the course of installation can proceed. There is no retention or holding of any said equipment except such as necessarily occurs in the ordinary and efficient course of transporting such tangible personal property to its ultimate destination and installing it as physically connected parts of plaintiff's railroad transportation plant.

48. At no time is the property herein referred to a part of a commercial stock in trade which is offered for sale or sold to the general public and plaintiff does not engage in the business of retailing any of the kinds of railway materials and supplies involved in this action and no part thereof is or was purchased or held for any purpose or purposes other than those herein described.

49. When stand-by facilities, materials and supplies are received, plaintiff's accounting department, pursuant to said accounting rules and regulations and uniform system [fol. 165] of accounts for railroad common carriers charges the cost thereof to its "materials and supplies" account. Upon taking such supplies from its railway stores or other places of detention for installation as a part of plaintiff's plant, facilities or equipment or for consumption in railway operation, plaintiff credits the cost thereof to its said "materials and supplies" account and charges them to the appropriate account for railway operation or for maintenance of roadway or equipment or other maintenance, or

to the appropriate property account, in accordance with the prescribed uniform system of accounts aforesaid.

The cost of handling and the cost of installation of all repair or renewal parts and the cost of handling of all of that class of materials which are consumed in operation are chargeable to operating expense or to operating property accounts and payable out of money devoted to transportation service. Such accounting is applicable to specific order materials and supplies as well as to stand-by materials and supplies.

50. The plaintiff did not change or alter the aforesaid purposes and uses of the tangible personal property involved in this action or its said intentions with regard thereto or divert any of said property to any other uses or purposes, and did not charge the cost of any part thereof to any business or enterprise other than its railroad transportation business, at the time of the incidence of said tax according to the terms of the statute, or at any time material to the issues here involved, except as hereinafter stated.

51. Notwithstanding any statement hereinbefore made relating to the manner of purchase and use of materials for car repairs and car maintenance, some part of plaintiff's purchases in interstate commerce of materials for [fol. 166] car repairs and car maintenance include materials which are used in the following circumstances.

It is the duty of common carriers by railroad to furnish cars for all classes of transportation which they undertake to perform and to provide cars for transportation throughout the United States by interchange with other lines of railroad. The interchange of cars between all lines of railroad is a part of transportation and such cars are inseparably used in both intrastate and interstate transportation. Common carriers by railroad are required by law to permit their freight cars to be interchanged to the rails of all connecting carriers. When cars of one line are on the tracks of another railroad, they are known as "foreign cars". When foreign railway cars are used by the plaintiff, they are hired or rented for such use and a compensation or rental is paid therefor by the plaintiff, while in operation on its line, and the cars so hired are used by the plaintiff as its own when so used. It is the duty of the plaintiff using cars so hired by it, both because of a contracted obligation and because of the unavoidable necessity of keeping cars in safe operating condition, to perform all necessary maintenance and

running repairs required by such cars. The contract to perform maintenance and running repairs for cars so rented and used by operating carriers is expressed in the code of rules governing the condition and repair to freight and passenger cars for the interchange of traffic, adopted by the Association of American Railroads, which rules are subscribed to by all railroad lines interchanging cars. Rule I of this code provides that the railroad is responsible for the condition of all cars on its line, and must give to all, regardless of responsibility, equal care as to inspection, oiling, packing and running repairs.

[fol. 167] All carriers using foreign cars pay to the car-owner per diem charges which are for reimbursement for interest on the investment, depreciation and cost of necessary repairs. When repairs are made to foreign cars by the operating railroad, the charge against the owner for reimbursement of the expense is an offset to the repair factor included in the basis for the per diem charge under which the owner assumes the expense of maintenance.

Cars, whether loaded or empty, having defects in violation of the Safety Appliance Acts, or the regulations of the Interstate Commerce Commission, may not be offered in interchange and cars in an unsafe condition or unsuitable for loading must be repaired on the line where such condition develops or is found to exist. The necessity for running repairs or for repairs necessary to enable the use of the car and its return to owning line, may result from normal wear or the completion of service life of a part which matures while the car is in possession of the operating carrier, or may result from accidental breakage or negligent handling of the car by the carriers making use thereof. In some cases, breakage or damage to the car may be due to a fault of the operating carrier, in which case the cost of repair is an expense properly chargeable to and borne by the operating carrier. The operating carrier making ordinary running repairs, or repairs necessary to enable the car to be safely operated, where damage to the car is not the result of the operating carrier's negligence, bills the owner of the car for actual cost of repairs and is reimbursed for such cost by the owner of the car. The obligation to make such repairs to foreign line cars while in plaintiff's possession is imposed upon plaintiff by the requirements of the Federal Safety Appliance Acts, the rules and [fol. 168] regulations of the Interstate Commerce Commission, the general interchange agreement of the Association

of American Railroads and plaintiff's legal duty to the shipping public to function efficiently as a common carrier.

Materials and supplies for foreign car repairs are purchased, accounted for and used in the same manner as like materials purchased for the repair of plaintiff's cars, and railroad operating capital is likewise used for the purchase of such materials, subject to reimbursement by the owner of the car for those repairs chargeable to the owner and not borne by the operating line. Foreign cars are used by the plaintiff for its purposes in inseparably carrying on intrastate, interstate and foreign commerce in the same manner as its own cars are used, and plaintiff's cars are subject to interchange with all foreign railroads in the same manner as foreign cars are interchanged to plaintiff's line.

52. Exclusive of the purchases of tangible personal property made by plaintiff for its own uses and in addition to the quantities hereinbefore described, upon which defendants claim the right to levy the tax in question, certain purchases of tangible personal property are made by or for plaintiff's subsidiary railroad companies in the following circumstances:

The Northwestern Pacific Railroad Company and the San Diego & Arizona Eastern Railway Company are wholly owned subsidiaries of Southern Pacific Company and, while nominally separate organizations, they are in many respects subject to the common management and control of Southern Pacific Company. Some of the officers and directors are common to all three of said companies. Said subsidiary companies cooperate closely with the parent company in furtherance of the parent company's transportation busi- [fol. 169] ness.

Each of these companies is a railroad engaged in the handling inseparably of intrastate, interstate and foreign transportation and commerce, and each of these railroads interchanges all classes of commerce with the Southern Pacific Company. Each of said railroads serves as a feeder line to and from plaintiff's lines of railroad. Each of these railroads reaches ports and points of interchange with carriers handling interstate and foreign commerce. Each of these railroads operates in the performance of transportation services in the same manner as plaintiff's operations are described in this stipulation, excepting as to the physical and geographical location of the lines of railroad.

Each of said lines of railroad has its own separate store

department and places of storage and means of distribution of materials and supplies on its own lines, and handles and distributes all tangible personal property used by it in the performance of transportation on its own lines.

The several methods of purchasing tangible personal property for said subsidiary companies are described as follows:

(a) The purchasing agent of each company makes certain purchases respectively in the name of said company, and all such purchases are delivered directly to said company at places on its lines and do not come into the possession of the plaintiff excepting as plaintiff may handle the same as a carrier in the process of transportation and delivery to said company as consignee. The purchases so made do not include any property which is not purchased in carload quantities. Taxes on account of the storage, use or other consumption of the materials described in this paragraph by said subsidiary lines are not sought to be enjoined in this proceeding.

[fol. 170] (b) In addition to property purchased in the manner above described, Southern Pacific Company purchases in its own name for its said subsidiary lines, certain materials to be used respectively by its subsidiary lines, which are purchased in carload lots and delivered respectively to said subsidiary lines in carload lots and said materials do not go into the possession of Southern Pacific Company for any purpose excepting as same may be handled by Southern Pacific Company as carrier thereof in the process of transportation and delivery of the same respectively to said subsidiary lines. Such purchases are originally made by the use of railway operating capital of Southern Pacific Company, which operating capital is reimbursed out of railway operating capital of the subsidiary company for which such purchases are made, and no part of such expenses or cost of such materials and supplies is ever charged to any other industry, business or activity of the plaintiff or of either of said subsidiary companies. Taxes on account of the storage, use or other consumption of the materials described in this paragraph by said subsidiary lines are not sought to be enjoined in this proceeding.

(c) In addition to tangible personal property purchased for said subsidiary companies in the manner hereinbefore described, Southern Pacific Company purchases in interstate commerce certain materials and supplies (hereinafter

specified) in limited quantities or in less than carload lots. Such purchases are made in the name of Southern Pacific Company for use by said subsidiaries respectively and are made in the same manner as Southern Pacific Company makes purchases for its own use and Southern Pacific Company is reimbursed for the full cost of making such purchases and handling and delivering the same to said subsidiary companies. Such purchases are originally made by [fol. 171] the use of railway operating capital of Southern Pacific Company, which railway operating capital is reimbursed out of railway operating capital of the subsidiary company for which such purchases are made and no part of such expense or the cost of said materials and supplies is ever charged to any other industry, business or activity of the plaintiff or of either of said subsidiary companies.

The following are all of the items which are specified in the bill of complaint and Exhibit "B" and which are purchased in the manner described in this part (c) above, to-wit:

Air brake parts, steel blooms, bolts and nuts, stay bolts, journal boxes, burners and lamps, car heating parts, car lighting parts, carbide, miscellaneous castings, steel chain, wire cloth, conduit, sheet copper, bell cord, cotters, couplers, seat coverings, retard devices, steel trap doors, electrical parts, feed water heater parts, copper flue ferrules, miscellaneous forgings, plug fuses, gaskets, McBeth glass, dust guards, headlight parts, air brake hose, steam hose, injector parts, boiler insulation, bar iron, flyer iron, stay bolt iron, McLaughlin joints, tail lamps, sash locks, lubricator parts, knuckles, common wire nails, metallic packing, priming paint, pantosote, sheathing paper, taper pins, plates and sheets, porous plugs, bull rings, brass rods, train battery separators, sheet steel, asbestos tape, torches, copper tubing, steel tubing, gate valves, globe valves, pressure valves, lock washers, wrot washers, graphite, driving journal grease, valve oil, colored cotton waste, journal box waste, terminal blocks, dry and condulet cells, channel pins, fibre end posts, battery renewals, copper wire, galvanized wire, iron wire, axes, hack saw blades, chisels, twist drills, files, wheel and coupler gauges, light globe guards, hammers, air tool hose, journal jacks, reamers, riveting hammer parts, saws, tube expanders, tool steel, taps, grinding wheels, wrenches, track [fol. 172] drill bits, track chisels, shank drills, ballast forks, track jacks, motor car parts, track picks, cross cut saws, track shovels, spark plugs, measuring tape, car cleaning

brushes, bunting, signal lamp burners, brake clubs, bell cord, crayons, fuses and torpedoes, lantern globes, mop heads, water hose, inspectors lanterns, sponges, baggage truck wheels, burlap, brass wire cloth, iron wire cloth, steel cloth, water hose, piling, black iron pipe, pipe fittings, galvanized iron pipe, round point shovels, stringers, washers.

Typical of such items of materials and supplies which are purchased in the name of Southern Pacific Company, for use by said subsidiaries as a purchasing agency respectively for said subsidiary companies, in the manner last described, is air brake hose. Air brake hose is put up in bundles or bales. Estimates for requirements of air brake hose for all three of said companies are respectively made by each of said companies and the estimated requirements for each three months' period are given to the purchasing agent of Southern Pacific Company. Said purchasing agent places the order therefor, purchases being made on single orders and usually for carload quantities. Shipments of such material are made to the store department of Southern Pacific Company and the required number of bundles or bales ordered for Southern Pacific Company is disposed of and handled in the manner hereinbefore described for the handling of Southern Pacific Company's materials and supplies. The remaining number of bundles or bales of air brake hose purchased for each of said subsidiary companies is held by said store department for such time as may be incidental to the reloading and transportation thereof to said subsidiary company. When said air brake hose is transported and delivered to either of said subsidiary companies, it is used in the operation of said railroad as a com- [fol. 173] mon carrier of intrastate, interstate and foreign commerce.

For accounting purposes, transfer requisitions are made to cover all such materials purchased for subsidiary companies and charges are made against said subsidiary companies for reimbursement of such cost of materials and purchasing expense. The procedure followed with respect to the handling of air brake hose, as above described, is followed in the handling of all of the tangible personal property hereinbefore itemized. All of said items so purchased for said subsidiary companies are purchased for use in and are actually used in conducting the transportation business of said subsidiary railroad companies in inseparably intermingled intrastate, interstate and foreign commerce.

Only that part of said items which are purchased by Southern Pacific Company for its own separate uses are included in the property on account of which defendants' claim use taxes as aforesaid. Taxes on account of the storage, use or other consumption of the materials described in this paragraph by said subsidiary lines are not sought to be enjoined in this proceeding.

53. As an exception to the facts hereinbefore stated, ties out of plaintiff's reserve or stand-by supply of ties, have been sold to Western Pacific Railroad Company in the following circumstances: on occasions when said railroad company has been in urgent need of a small supply of ties and has requested the same of plaintiff, plaintiff has sold to Western Pacific Railroad Company, such small amount of ties as would not materially diminish its reserve supply thereof. Such sales have not at any time amounted to in excess of one-tenth of one per cent of plaintiff's regular reserve supply of ties. Upon such a sale being made, a sufficient quantity of ties is included in plaintiff's next purchase of ties to make up such depletion of its reserve [fol. 174] supply. An accommodation of this character is only made in some exceptional emergency and such sales are of extremely rare occurrence. Similar sales of some other material or repair part may have been made to some railroad company other than plaintiff's subsidiary railroads in some exceptional emergency.

54. By reason of its inextricably intermingled interstate, foreign and intrastate commerce and business, plaintiff is compelled to purchase from points outside of California and to use and consume a greater amount of tangible personal property than it would be required to purchase if it were engaged only in intrastate railroad transportation business.

55. Notwithstanding that none of the property aforesaid was, is or will be used exclusively and separately by the plaintiff in conducting intrastate transportation business, but that all of it is used as hereinbefore stated, defendants have demanded of the plaintiff the taxes aforesaid under the provisions of Ruling No. 11 of the defendant, said State Board of Equalization, promulgated on or about February 6, 1936, which said ruling is as follows:

"The fact that tangible personal property is purchased in interstate or foreign commerce does not exempt from the tax the storage, use or other consumption of such property

in this State after the shipment of the property in interstate or foreign commerce has ended.

"The fact that tangible personal property issued in this state in interstate or foreign commerce following its storage in this State does not exempt the storage of the property from the tax. The tax does not apply to the use or storage of property purchased for use in interstate or foreign commerce and actually placed in use in interstate or foreign commerce prior to its entry into this State."

[fol. 175] Conclusions of Law

(1) The court has jurisdiction of all of the parties hereto and of the subject-matter of this action.

(2) This suit arises under the Constitution of the United States.

(3) The imposition of the California Use Tax upon the acts and transactions found in the foregoing findings of fact to have occurred with respect to the tangible personal property described in said findings of fact, after the termination of the interstate transportation thereof, would not be a direct burden upon the interstate commerce and business of the plaintiff and would not be contrary to or in violation of the provisions of Clause 3 of Section 8 of Article I of the Constitution of the United States and the rights, privileges and immunities of the plaintiff thereunder.

(4) By reason of the facts and circumstances hereinbefore found and concluded plaintiff's application for a permanent injunction should be denied and the bill of complaint on file herein should be dismissed.

Let the Decree be entered accordingly.

William Denman (United States Circuit Judge).
Michael J. Roche (United States District Judge).
—— —— (United States District Judge).

Plaintiff acknowledges due and timely service of the foregoing proposed findings of fact and conclusions of law, this 14th day of May, 1938.

Harry H. McElroy, Attorney for Plaintiff.

Approved as to form as provided by Rule 22.

Harry H. McElroy, —— ——, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 176] IN UNITED STATES DISTRICT COURT

[Title omitted]

OBJECTIONS TO CONCLUSIONS OF LAW PROPOSED BY DEFENDANTS, AND CONCLUSIONS OF LAW PROPOSED BY PLAINTIFF

Now comes the plaintiff above named and objects to the Conclusions of Law proposed by the defendants herein and [fol. 177] lodged with the Clerk of this Court, and to each one thereof, on the grounds that said proposed Conclusions of Law are insufficient, incomplete and incorrect, in the respects in which they differ from plaintiff's proposed conclusions of law, and deny to plaintiff the relief to which it is lawfully and equitably entitled under the Court's findings of fact, and if said defendants' proposed Conclusions of Law or any of them are adopted by the Court, plaintiff asks for an exception to each and all of said defendants' proposed Conclusions of Law as may be thus adopted.

Plaintiff herewith submits to the Court its proposed Conclusions of Law, which plaintiff respectfully represents to be sufficient and correct and which are justified by the Court's Findings of Fact, and moves the adoption thereof, each and separately, and asks to be allowed an exception to the denial thereof and to the denial of each one thereof, if the Court refuses to adopt the same or either thereof:

Conclusions of Law Proposed by Plaintiff

The Court having made and filed its Findings of Fact herein, now makes the following conclusions of law thereon:

1. The Court has personal jurisdiction of each of the defendants herein, and has jurisdiction of the subject matter of this action because of diversity of citizenship, inasmuch as the action is between citizens of different states, and the amount involved exceeds the sum of $3,000, exclusive of interest and costs. The Court further concludes that jurisdiction arises from the fact that this action involves a controversy arising under the Constitution of the United States.

2. The Court concludes as a matter of law, based upon the admitted allegations of the bill of complaint and the findings of fact heretofore made and filed herein, that plaintiff is without a plain, speedy and adequate remedy at law in

[fol. 178] the premises, and that plaintiff is therefore entitled to relief in equity in this Court.

3. The Court concludes as a matter of law that all purchases of tangible personal property involved in this action were made and paid for by funds classified as railway operating capital and that the property purchased with such capital is subject to classification and is classified as railway operating property from and after the time of its purchase.

4. The Court concludes as a matter of law that all of the tangible personal property involved in this action was purchased for the sole, fixed and predetermined purposes of using the same for carrying on plaintiff's intermixed and inseparable intrastate, interstate and foreign transportation business and that said property was devoted to the service of transportation and use in carrying on said business from the time of its purchase.

5. The Court concludes as a matter of law that any and all storage of the tangible personal property involved in this action made by the plaintiff within the State of California was not a storage separate or separable from and antecedent to plaintiff's use in carrying on its intermingled and inseparable intrastate, interstate and foreign transportation business, but was an inseparable part of use in carrying on such business.

6. The Court concludes as a matter of law that the tangible personal property purchased for and devoted to plaintiff's use as materials and supplies for the current operation, repair and renewal of its existing railway transportation plant was for an integral use in plaintiff's interstate commerce operations and at all times from and after the date of purchase and transportation into the State of California, the storage, use or other consumption of said property by plaintiff constituted a use in interstate commerce.

7. The Court concludes as a matter of law that the tan-
[fol. 179] gible personal property purchased for and devoted to an existing renewal and maintenance program was for an integral use in plaintiff's interstate commerce operations and at all times from and after the date of purchase

and transportation into the State of California, the storage, use or other consumption of such property by plaintiff constituted a use in interstate commerce.

8. The Court concludes as a matter of law that the plaintiff has established that the storage of the tangible personal property involved in this action, solely for its current repairs and renewals and necessary extensions of its intermingled interstate and intrastate enterprise and plant, and without which usage the railways would stop running, is a use in interstate commerce.

9. The Court concludes as a matter of law that the tax proposed to be assessed upon such use is a tax directly upon an interstate commerce use—that is, a tax upon interstate as distinguished from any intrastate function performed by the railway as a public carrier.

10. The Court concludes as a matter of law that the imposition of the said use tax upon storage within California would impose a tax which would be extra-territorial in its operation and would reach to and impose a direct tax and a direct burden upon ultimate uses and consumption in other states of the property so stored or of an inseparable part thereof.

11. The Court concludes as a matter of law that the use taxes sought to be imposed upon plaintiff by the defendants under the said Use Tax Act of 1935 on account of the storage, use or other consumption of the tangible personal property in question, were and are direct taxes upon operative instrumentalities of interstate commerce, a direct burden of expense chargeable to such commerce, and an unconstitutional burden on interstate transportation and interstate commerce, contrary to and in violation of the pro- [fol. 180] visions of Article I, Section 8, Clause 3 of the Constitution of the United States.

12. The Use Tax Act of 1935, if construed and applied by defendants so as to impose a tax on the acts or transactions, or any of them, found in the foregoing Findings of Fact to have occurred with respect to the tangible personal property described in said Findings of Fact, after the termination of the interstate transportation thereof, is contrary to and in violation of the provisions of Article I, Section 8, Clause

3, of the Constitution of the United States, and the rights, privileges and immunities of the plaintiff thereunder.

13. The Court concludes as a matter of law that the defendants may not constitutionally enforce the provisions of the California Use Tax Act against the plaintiff upon the tangible personal property set forth in the complaint and described in the Findings of Fact, or any like or similar property, and that plaintiff is entitled to a permanent injunction.

—— ——, United States Circuit Judge. —— ——, United States District Judge. —— ——, United States District Judge.

Respectfully submitted, Harry H. McElroy, Attorney for Plaintiff.

Dated May 26, 1938.

Service of copy of the foregoing Conclusions of Law requested by plaintiff is admitted this 26 day of May, 1938.
U. S. Webb, by J. J. Arditto, Attorney for Defendants.

Approved as to Form as Provided in Rule 22.
U. S. Webb, by J. J. Arditto, Attorney for Defendants.

Lodged: May 26, 1938.

[fol. 181] In United States District Court, Northern District of California, Southern Division

Equity No. 4055-R

Southern Pacific Company, a Corporation, Plaintiff,

vs.

John C. Corbett et al., Defendants

Final Decree—Filed June 14, 1938

This Cause came on to be heard on the 28th day of December, 1937, and was argued by Harry H. McElroy and Guy V. Shoup, Esqs., attorneys for the plaintiff, and Honor-

able U. S. Webb, Attorney General of the State of California [fol. 182] by H. H. Linney and James J. Arditto, Deputies Attorney General, and thereupon on consideration thereof, it is Ordered, Adjudged and Decreed as follows: to-wit:

That plaintiff's application for a permanent injunction be denied, and the plaintiff's bill of complaint be dismissed.

It is Further Ordered, Adjudged and Decreed that the defendants recover their costs herein expended.

Dated this 14th day of June, 1938.

William Denman. United States Circuit Judge.
Michael J. Roche, United States District Judge.
—— ——, United States District Judge.

Approved as to form, June 4th, 1938.

Guy V. Shoup, Harry H. McElroy, Attorneys for Plaintiff.

Receipt of a copy of the within is admitted this 4th day of June, 1938.

By Harry H. McElroy, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 183] In United States District Court

[Title omitted]

Petition for Appeal, Assignment of Errors and Prayer for Reversal—Filed June 21, 1938

Petition for Appeal

Considering itself aggrieved by the final judgment and decree of the District Court of the United States, in and [fol. 184] for the Northern District of California, Southern Division, specially constituted under Section 266 of the Judicial Code, in the above-entitled case, the plaintiff in said case, Southern Pacific Company, hereby prays that an appeal from said judgment and the whole thereof be allowed to the Supreme Court of the United States, and for an order fixing the amount of the bond thereon.

Assignment of Errors

And the said plaintiff, (appellant on the appeal) assigns the following errors in the record and proceedings in the said cause:

The District Court of the United States, in and for the Northern District of California, Southern Division, erred in its opinion and decision in said cause in the following particulars:

1. The Court erred in making the conclusion of law that the imposition of the California use tax upon the acts and transactions found in the findings of fact to have occurred with respect to the tangible personal property described in said findings of fact, after the termination of the interstate transportation thereof, would not be a direct burden upon the interstate commerce and business of the plaintiff and would not be contrary to or in violation of the provisions of Clause 3 of Section 8 of Article I of the Constitution of the United States and the rights, privileges and immunities of the plaintiff thereunder.

2. The Court erred in making the conclusion of law that by reason of the facts and circumstances found and concluded, plaintiff's application for a permanent injunction should be denied and the bill of complaint on file herein should be dismissed.

3. The Court erred in refusing to make the conclusion of law requested by the plaintiff that all purchases of tangible personal property involved in this action were made and paid for by funds classified as railway operating capital [fol. 185] and that the property purchased with such capital was subject to classification and was classified as railway operating property from and after the time of its purchase.

4. The Court erred in refusing to make the conclusion of law requested by the plaintiff that all of the tangible personal property involved in this action was purchased for the sole, fixed and predetermined purposes of using the same for carrying on plaintiff's intermixed and inseparable intrastate, interstate and foreign transportation business and that said property was devoted to the service of transportation and use in carrying on said business from the time of its purchase.

5. The Court errred in refusing to make the conclusion of law requested by the plaintiff that any and all storage of the tangible personal property involved in this action made by the plaintiff within the State of California was not a storage separate or separable from and antecedent to plaintiff's use in carrying on its intermingled and inseparable intrastate, interstate and foreign transportation business, but was an inseparable part of use in carrying on such business.

6. The Court erred in refusing to make the conclusion of law requested by the plaintiff that the tangible personal property purchased for and devoted to plaintiff's use as materials and supplies for the current operation, repair and renewal of its existing railway transportation plant was for an integral use in plaintiff's interstate commerce operations and at all times from and after the date of purchase and transportation into the State of California, the storage, use or other consumption of said property by plaintiff constituted a use in interstate commerce.

7. The Court erred in refusing to make the conclusion of law requested by the plaintiff that the tangible personal property purchased for and devoted to an existing renewal and maintenance program was for an integral use in plain-
[fol. 186] tiff's interstate commerce operations and at all times from and after the date of purchase and transportation into the State of California, the storage, use or other consumption of such property by plaintiff constituted a use in interstate commerce.

8. The Court erred in refusing to make the conclusion of law, requested by the plaintiff, that the plaintiff had established that the storage of the tangible personal property involved in this action, solely for its current repairs and renewals and necessary extensions of its intermingled interstate and intrastate enterprise and plant, and without which usage the railways would stop running, was a use in interstate commerce.

9. The Court erred in refusing to make the conclusion of law, requested by the plaintiff, that the tax proposed to be assessed upon such use is a tax directly upon an interstate commerce use—that is, a tax upon an interstate as distinguished from any intrastate function performed by the railway as a public carrier.

10. The Court erred in refusing to make the conclusion of law, requested by the plaintiff, that the imposition of the said use tax upon storage within California would impose a tax which would be extra-territorial in its operation and would reach to and impose a direct tax and a direct burden upon ultimate uses and consumption in other states of the property so stored or of an inseparable part thereof.

11. The Court erred in refusing to make the conclusion of law, requested by the plaintiff, that the use taxes sought to be imposed upon plaintiff by the defendants under the said Use Tax Act of 1935 on account of the storage, use or other consumption of the tangible personal property in question, were and are direct taxes upon operative instrumentalities of interstate commerce, a direct burden of expense chargeable to such commerce, and an unconstitutional burden on interstate transportation and interstate com- [fol. 187] merce, contrary to and in violation of the provisions of Article I, Section 8, Clause 3 of the Constitution of the United States.

12. The Court erred in refusing to make the conclusion of law requested by the plaintiff that the said Use Tax Act of 1935, as construed and applied by defendants so as to impose a tax on the acts or transactions, or any of them, found in the Court's Findings of Fact to have occurred with respect to the tangible personal property described in said Findings of Fact, after the termination of the interstate transportation thereof, is contrary to and in violation of the provisions of Article I, Section 8, Clause 3 of the Constitution of the United States, and the rights, privileges and immunities of the plaintiff thereunder.

13. The Court erred in refusing to make the conclusion of law requested by the plaintiff that the defendants might not constitutionally enforce the provisions of the said California Use Tax Act against the plaintiff upon the tangible personal property set forth in the complaint and described in the Findings of Fact, or any like or similar property, and that plaintiff is entitled to a permanent injunction.

14. The Court erred in failing and refusing to make the conclusion of law based upon and justified by the Findings of Fact herein, that the imposition and collection of the said tax effectuates a taking of plaintiff's property without due

process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

15. The Court erred in deciding, adjudging and decreeing that plaintiff's application for a permanent injunction be denied.

16. The Court erred in deciding, adjudging and decreeing that plaintiff's bill of complaint be dismissed.

[fols. 188-229] Prayer for Reversal

For which errors, the said plaintiff, Southern Pacific Company, prays that said judgment and decree of the District Court of the United States, in and for the Northern District of California, Southern Division, in the above entitled cause, be reversed and that said Court be ordered to enter a decree in favor of said plaintiff as prayed for in plaintiff's bill of complaint, and that plaintiff be awarded its costs.

Harry H. McElroy, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 230] In United States District Court

[Title omitted]

Order Allowing Appeal—Filed June 21, 1938

The plaintiff in the above entitled suit having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment and decree [fols. 231-237] made and entered in the above entitled suit by the District Court of the United States, in and for the Northern District of California, Southern Division, on the 14th day of June, 1938, and from each and every part thereof, and having presented and filed its petition for appeal, assignments of errors, and prayer for reversal, pursuant to the statutes and rules of the Supreme Court of the United States, in such case made and provided.

It is Now Ordered that an appeal be, and the same is hereby allowed to the Supreme Court of the United States from the District Court of the United States, in and for the Northern District of California, Southern Division, in this

cause, as provided by law, and it is further ordered that the Clerk of said District Court shall prepare and certify a transcript of the record, proceedings and judgment and decree in this cause, and forthwith transmit the same to the Supreme Court of the United States.

And it is Further Ordered that security for costs on appeal be fixed in the sum of $500.00 (Five Hundred Dollars).

William Denman, United States Circuit Judge.

[File endorsement omitted.]

[fol. 238] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO CONTENTS OF TRANSCRIPT OF RECORD, ETC.—Filed June 23, 1938

It is hereby stipulated that the transcript of record to be filed in the Supreme Court of the United States, pursuant [fol. 239] to the appeal heretofore allowed herein, shall include the following:

1. Bill of Complaint, including Exhibits thereto.
2. Stipulation dated April 29, 1937, relating to construction of complaint.
3. Motion for Restraining Order, etc.
4. Order Noticing Necessity for Other Judges, Issuing Temporary Restraining Order and Order to Show Cause, etc., dated July 10, 1936.
5. Proof of service of copy of bill of complaint, temporary restraining order and order to show cause, etc., on Hon. Frank F. Merriam, Governor of the State of California.
6. Motion to dismiss Bill of Complaint.
7. Opinion on Motion to Dismiss Bill of Complaint and Awarding Interlocutory Injunction.
8. Decree for Interlocutory Injunction, etc., dated November 16, 1937.
9. Answer to Bill of Complaint.
10. Stipulation of Facts.
11. Stipulation for Correction of Stipulation of Facts, dated December 27, 1937.
12. Opinion of the Court, filed May 3, 1938.

13. Findings of Fact and Conclusions of Law Proposed by Defendants, and Adopted by the Court.

14. Objections to Conclusions of Law Proposed by Defendants, and Conclusions of Law Proposed by Plaintiff.

15. Final Decree.

16. Petition for Appeal, Assignment of Errors and Prayer For Reversal.

17. Statement as to Jurisdiction.

18. Order Allowing Appeal.

19. Bond for Costs.

[fol. 240] 20. The Original of the Citation on Appeal and Acknowledgment of Service thereof.

21. Notice under Rule 12, paragraph 2, and Acknowledgment of Service of Appeal Papers.

22. Stipulation as to Contents of Transcript of Record, etc.

Inasmuch as the case was submitted on the complaint, answer and stipulation of facts, which are to be included in the transcript of record as herein stipulated, there is no narrative statement of evidence pursuant to Equity Rule 75.

It is agreed that the proof of service of the bill of complaint and notice of hearing upon the Attorney General of the state and the other defendants, the bonds for temporary restraining order, the bonds for interlocutory injunction, the stipulations and orders for substitution of defendants (being successive individual members of the State Board of Equalization of the State of California), the order of the Court restoring and continuing the interlocutory injunction pending appeal and the bond therefor, all heretofore filed herein, are not necessary to the consideration of the appeal and need not be included in the transcript of record.

Harry H. McElroy, Counsel for Plaintiff. U. S. Webb, Attorney General, H. H. Linney, Deputy Attorney General, by James J. Arditto, Deputy Attorney General, Counsel for Defendants.

[File endorsement omitted.]

[fol. 241] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 242-243] Citation, in usual form, showing service on U. S. Webb et al., filed June 23, 1938, omitted in printing.

[fol. 244] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED—Filed July 19, 1938

The appellant adopts its assignment of errors as its statement of the points to be relied upon in this Court.

The appellant designates the whole of the record, as filed, to be printed except as follows:

(a) Stipulation dated April 29, 1937, relating to construction of the complaint (p. 52 of the original certified transcript).

(b) Stipulation for correction of stipulation of facts dated December 27, 1937, (p. 128 transcript).

(c) Bond for costs (p. 232 transcript).

(d) Exhibit C of the bill of complaint (p. 51 transcript), the same being a copy of the California Use Tax Act of 1935, which is now officially published in Cal. Stats. 1935, p. 1297, ch. 361.

Harry H. McElroy, Counsel for Appellant.

[fol. 245] Undersigned counsel for all appellees hereby accept and acknowledge service of copy of the foregoing statement of points to be relied upon and designation of the parts of the record to be printed, and stipulate and agree that the parts of the record to be printed as therein shown are sufficient for consideration of the questions presented in the appeal of this case.

U. S. Webb, H. H. Linney, Counsel for Appellees.

[fol. 246] [File endorsement omitted.]

Endorsed on cover: File No. 42,697. N. California, D. C. U. S. Term No. 212. Southern Pacific Company, appellant, vs. John C. Corbett, Fred E. Stewart, Richard E. Collins, William G. Bonelli and Harry B. Riley, as Members of the State Board of Equalization of the State of California, et al. Filed July 19, 1938. Term No. 212, O. T., 1938.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938.

No. 212

SOUTHERN PACIFIC COMPANY (A CORPORATION),
Appellant,

vs.

JOHN C. CORBETT, FRED E. STEWART, RICHARD E. COLLINS, WILLIAM G. BONELLI AND HARRY B. RILEY, AS MEMBERS OF THE STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA; STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA AND U. S. WEBB, THE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Appellees.

STATEMENT AS TO JURISDICTION.

This is an appeal from a final decree of a District Court of the United States specially constituted pursuant to Section 266 of the Judicial Code, denying a permanent injunction and dismissing the bill of complaint.

The suit was brought by the appellant in the United States District Court for the Northern District of California, Southern Division, to enjoin State officers—the

State Board of Equalization of the State of California and its individual members, and the Attorney General of the State—from enforcing the California Use Tax Act of 1935 (Cal. Stats. 1935, p. 1297, ch. 361) with respect to property purchased by appellant outside the State and used by it in the State of California and in other States in the operation of its inextricably intermingled interstate, foreign and intrastate railroad transportation business. The injunction is prayed upon the ground that the statute, as sought to be applied by appellees with respect to the property in question, is repugnant to the commerce clause of the Constitution of the United States and in violation of the Fourteenth Amendment to the Constitution of the United States.

The appellant pressed its application for an interlocutory injunction, and the court, specially constituted of three judges, denied appellees' motion to dismiss the bill of complaint and granted the application for interlocutory injunction. The opinion on the motion to dismiss the bill of complaint and the application for interlocutory injunction is reported at 20 F. Supp. 940, and a copy thereof is appended hereto as Appendix A.

Appellees answered and the facts were stipulated. Upon final hearing the court made findings of fact and conclusions of law, denied a permanent injunction and dismissed the bill. A copy of the court's opinion upon the final hearing is appended hereto as Appendix B. This opinion is as yet unreported.*

Jurisdiction of the District Court.

This is a suit of a civil nature in equity, between citizens of different States,[1] in which the amount of the taxes the

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* Since the presentation and filing of the jurisdictional statement, this opinion has been reported at 23 Fed. Supp. 193.

[1] Southern Pacific Company is a Kentucky corporation and all defendants are residents of California.

collection of which is sought to be enjoined exceeds $3,000,[2] and the suit arises under the Constitution of the United States.

Notice of hearing of appellant's application for interlocutory injunction was duly given in accordance with Section 266 of the Judicial Code (United States Code, Title 28, Sec. 380), including notice to the Governor of the State of California and the Attorney General of the State of California.

The bill of complaint alleged facts showing that appellant would be irreparably injured if the injunction should not be granted, and showing that appellant was without a plain, speedy or adequate remedy at law, or in equity in the State courts, and particularly that the appellant was without any remedy at law in the Federal courts.[3] The District Court sustained its equity jurisdiction on the ground last mentioned, the only ground which it found necessary to consider (see opinion, Appendix A).

It is well settled that in suits not controlled by the 1937 amendment to Section 24 of the Judicial Code, the want of

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[2] The amount of taxes claimed to be due at the time the suit was commenced was $47,705.72. The complaint asks an injunction against the collection of these taxes and of the taxes for each subsequent quarterly period for which appellees claim that a tax is due under the provisions of the California Use Tax Act. Taxes claimed to be due up to the time of the final decree amounted to $402,020.92.

[3] The bill of complaint in this case was filed July 10, 1936. The Act of Congress of August 21, 1937 (c. 726, 50 Stat. 738), amending section 24 of the Judicial Code, which now provides that no district court shall have jurisdiction of any suit to enjoin, suspend or restrain the assessment, levy or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy and efficient remedy may be had at law or in equity in the courts of such State, expressly provided that its provisions should not apply to suits commenced prior to its passage.

a remedy in the Federal courts is a ground of Federal equity jurisdiction.

City Bank Co. v. *Schnader* (1934), 291 U. S. 24, 29;
Risty v. *Chicago, R. I. & Pac. Ry. Co.* (1926), 270 U. S. 378, 388;
Chicago, B. & Q. R. R. v. *Osborne* (1924), 265 U. S. 14, 16;
Smyth v. *Ames* (1898), 169 U. S. 466, 515-517.

The Jurisdiction of the Supreme Court of the United States.

As above stated, this is a direct appeal from the final decree of a specially constituted court of three judges, denying a permanent injunction in a suit brought to restrain State officers from enforcing a State statute. This Court has jurisdiction under Sections 238(3) and 266 of the Judicial Code (United States Code, Title 28, Secs. 345 and 380).

The following cases sustain the jurisdiction of this court:
Stratton v. *St. Louis S. W. Ry.* (1930), 282 U. S. 10, 14, 16;
Sterling v. *Constantin* (1932), 287 U. S. 378, 393-394;
Coverdale v. *Arkansas-Louisiana Pipe Line Co.* (1938), —U. S. —, 58 S. Ct. 736, 738.

The State Statute, the Validity of Which is Involved.

The California statute the enforcement of which is sought to be enjoined in this suit is the California Use Tax Act of 1935, Cal. Stats. 1935, p. 1297, ch. 361. Since this suit was commenced, the statute was amended, in particulars not pertinent to this suit except as hereinafter specified, by Cal. Stats. 1937, pp. 1327, 1874 and 1935, chs. 401, 671 and 683. Section 3 of the act, so far as material, provides:

> "An excise tax is hereby imposed on the storage, use or other consumption in this State of tangible personal

property purchased from a retailer on or after July 1, 1935, for storage, use or other consumption in this State at the rate of three per cent of the sales price of such property.

"Every person storing, using or otherwise consuming in this State tangible personal property purchased from a retailer shall be liable for the tax imposed by this act, and the liability shall not be extinguished until the tax has been paid to this State; * * *."

Section 2(a) defines "Storage" as "any keeping or retention in this State for any purpose except sale in the regular course of business of tangible personal property purchased from a retailer." Section 2(b) defines "Use" as "the exercise of any right or power over tangible personal property incident to the ownership of that property, except that it shall not include the sale of that property in the regular course of business." Section 2(j) defines "In this State" as "within the exterior limits of the State of California, and includes all territory within such limits owned by or ceded to the United States of America."

Section 4 contains a number of exemptions, among which are, (a) property, the gross receipts from the sale of which are taxed by the California Retail Sales Tax Act (Cal. Stats. 1933, ch. 1020) and (b) property, the storage, use or other consumption of which the State is prohibited from taxing under the Constitution or laws of the United States or under the Constitution of California. The effect of the first exemption in Section 4 is to make the use tax applicable only to tangible personal property purchased outside the State or in interstate commerce.

Section 6 requires every retailer maintaining a place of business in the State and making sales of tangible personal property for storage, use or other consumption in the State, to collect the tax from the purchaser at the time of making the sales. Section 7 makes the tax due and payable quar-

terly to the State Board of Equalization on or before the 15th day of the month next succeeding each quarterly period, the first quarterly period being that which commenced July 1, 1935. It also requires every retailer maintaining a place of business in the State to file with the Board, on or before the 15th day of the month following the close of each quarterly period, a return for the preceding quarterly period in the form prescribed by the Board, showing the total sales price of the tangible personal property sold by the retailer during the preceding quarterly period, the storage, use or consumption of which is subject to the tax imposed by the act; and to accompany the return by a remittance of the amount of the tax required to be collected by the retailer during that period. If the property is purchased from a retailer not maintaining a place of business in the State, the purchaser is required to file the return and remittance.

Section 8 imposes a penalty of ten per cent, plus interest of one half of one per cent per month, or fraction thereof, for failure to pay the tax or make the return.

Section 20 provides for a summary judgment for the amount of unpaid taxes in favor of the State and against the retailer or other person required to pay the tax, and permits the Board to seize the property of delinquents and sell it at public auction for the amount of the tax, interest, penalties and costs. Section 28 permits the Board to bring suit at any time within three years after any amount has become due and payable and has become delinquent, and a certificate of the Board showing the delinquency is made *prima facie* evidence of the determination of the amount due, of the delinquency, and of the compliance by the Board with all the provisions of the act in relation to the computation and determination of the amount.

Section 30 makes any retailer or other person failing or refusing to furnish a return, or supplemental return or

other data required by the Board, guilty of a misdemeanor and subject to a fine of not exceeding $500 for each offense. Section 31 makes any violation of the act, except as otherwise therein provided, a misdemeanor and punishable as such.

Section 29 (Section 25 since the 1937 amendment) forbids the issuance of any injunction or writ of mandate or other legal or equitable process in any suit, action or proceeding in any court against the State or any officer thereof to prevent or enjoin the collection of the tax or any amount of tax imposed by the act. The only remedy afforded to the taxpayer is to pay the taxes under verified protest, setting forth the grounds of objection to the legality thereof, and thereafter to bring a suit against the State Treasurer in the State Superior Court in Sacramento County to recover the amount of the taxes. The period of limitation for such suits is sixty days (since the 1937 amendment—one year). The superior court is forbidden to consider any grounds of illegality other than those set forth in the protest filed at the time of the payment of the tax. If judgment in such action is rendered for the plaintiff, the amount of the judgment is first to be credited on any taxes or amounts due from the plaintiff under the act, and the balance of the judgment is to be refunded to the plaintiff, with interest allowed at the rate of six per cent per annum upon the amount found to have been illegally collected, from the date of payment to the date of allowance of credit on account of the judgment or to a date preceding the date of the refund warrant by not more than thirty days, such date to be determined by the Controller (since the 1937 amendment, by the Board). The act prohibits any judgment in any such action when it is brought by or in the name of an assignee of the retailer or other person paying the tax, or by any person other than the person paying the tax.

The Questions Involved are Substantial.

The appellant is engaged exclusively in inextricably intermingled interstate, foreign and intrastate railroad transportation business. The property in question is purchased by the appellant with railroad operating capital for the sole purpose of using it in that business and much of the property is especially designed and manufactured for railroad purposes and is either unfit for any other purposes or cannot be economically used for any other purposes. All of the property is for current railroad uses in California and in other States, and much of it, consisting of railroad materials and supplies, is required to be distributed over plaintiff's lines of railroad within the State of California and in other States for repairs, uses and consumption in such railroad operations and for emergency purposes.

The tax is a flat-rate tax upon the storage, use or other consumption of such property, measured by 3% of the purchase price, without apportionment to take into account the division of use between intrastate, foreign and interstate commerce or to take into account the apportionment of undivided and indivisible uses by the railroad as between the State of California and other States in which appellant operates its railroad business.

Under the doctrine of *Helson and Randolph* v. *Kentucky* (1929), 279 U. S. 245, which was reaffirmed in *Bingaman* v. *Golden Eagle Lines* (1936), 297 U. S. 626, and was recognized in *Coverdale* v. *Arkansas-Louisiana Pipe Line Co.* (1938), — U. S. —, 58 S. Ct. 736, State statutes taxing the use of property in interstate commerce for the operation of instrumentalities of interstate commerce are unconstitutional as in violation of the commerce clause.

Under *Cooney* v. *Mountain States Tel. Co.* (1935), 294 U. S. 384, a State excise tax cannot validly be applied in-

discriminately and without apportionment to an instrumentality common to interstate and intrastate commerce.

The appellant contends that the use of the property in question, being indiscriminately in interstate, foreign and intrastate commerce, cannot constitutionally be subjected to the flat-rate, unapportioned tax in question; that the holding of stand-by facilities, materials and supplies, is an indispensable, integral part of the conduct of its inextricably intermingled interstate, foreign and intrastate commerce and business; and that no use, storage or other consumption of the property occurs in California which is not a part of such commerce; and that the taxation of appellant's use of property which is inseparably used in the transaction of its railroad business both within and without the State of California, is extra-terriorial in its effect and is not only a direct and undue burden on interstate and foreign commerce but in violation of the due process clause of the Federal Constitution.

The District Court, duly constituted of three judges in accordance with Section 266 of the Judicial Code, upon the appellees' motion to dismiss the bill of complaint and the appellant's application for an interlocutory injunction, held that the use, keeping, retention or storage of the property which occurred in the State of California was a use in interstate commerce and was not taxable by the State, and that the case was not controlled by the decisions in *Nashville, C. & St. L. Ry.* v. *Wallace* (1933), 288 U. S. 249, and *Edelman* v. *Boeing Air Transp.* (1933), 289 U. S. 249 (see Appendix A). On final hearing the District Court, duly constituted of three judges as aforesaid, reversed its conclusion, holding that although the stipulated facts sustained the pertinent allegations of the bill, discussed in its former opinion, and although the use of the property was a use in interstate commerce, the threatened enforcement of the taxing statute would not impose a direct or undue

burden on the appellant's interstate commerce business (see Appendix B).

This Court has never specifically decided (although appellant contends that the *Helson, Bingaman* and *Cooney* cases, *supra,* are decisive of this case) whether a use tax, measured by a fixed percentage of the purchase price of property without apportionment according to the division of use in intrastate and interstate and foreign commerce, and imposed directly upon (a) the use in inextricably intermingled interstate, foreign and intrastate commerce or (b) the installation or (c) the retention for stand-by purposes, of special equipment, materials, supplies, etc., which are purchased by a railroad company engaged exclusively in inextricably intermingled interstate, foreign and intrastate commerce for use exclusively in that business, or which is manufactured specially for and dedicated exclusively to and is not divertible from that business, and which is used exclusively and necessarily in the conduct of that business and commerce, within the taxing State, and a substantial part thereof inseparably and indivisibly in other States, contravenes the commerce clause or the due process clause of the Federal Constitution.

The questions presented, we submit, are substantial.

The Date of the Decree Sought to be Reviewed, etc.

The final decree of the District Court which is herein appealed from was signed and filed June 14, 1938. The application for appeal was presented June 20, 1938.

Dated June 20, 1938.

Respectfully submitted,

GUY V. SHOUP,
HARRY H. MCELROY,
Attorney for Appellant.

APPENDIX "A".

IN THE SOUTHERN DIVISION OF THE UNITED STATES DISTRICT COURT, IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA.

In Equity.

No. 4055-S.

Southern Pacific Company, a Corporation, *Plaintiff*,

v.

John C. Corbett, Fred E. Stewart, Richard E. Collins, Ray L. Edgar, and Ray L. Riley, as Members of the State Board of Equalization of the State of California; State Board of Equalization of the State of California, and U. S. Webb, the Attorney General of the State of California, *Defendants.*

Before Denman, Circuit Judge, and St. Sure and Roche, District Judges.

Denman, *Circuit Judge:*

This case involves the question whether the necessary incidental storage of materials bought by an interstate railway company for installation in the service of repair and replacement under a predetermined plan for the maintenance and improvement of the service, is a use in interstate commerce. The State of California, under a general tax law applying to all persons storing within the state goods purchased without the state upon which goods no state sales tax has been paid, seeks to have included in the large number of persons subject to the statute those engaged in commerce among the states.

By the logically immediate process of federal law, the tax on these materials stored for current repairs, operation, etc., of the interstate railway is translated into the passenger fares and merchandise carriage rates of all the passengers and shippers of the thirty or forty states ship-

ping into and out of California.[1] The persons interested in and affected by our decision, though not appearing here, are those upon whom the tax will certainly fall. Though not litigants, their interest transcends that of the corporation and its stockholders.

The Constitution gives to Congress the regulation of the management of interstate railways. If the court decides that this storage of materials is not a use in interstate commerce, then the Congress may not declare it to be or regulate it as such a use. If Congress desires to require the railways to keep in storage for current use such necessary materials it can do so only by invading intrastate activities under an extension of the principles laid down in Nat. Labor Rel. Board *v.* Jones & Laughlin Steel Co., 81 L. ed. 563 and Edwards *v.* U. S. (C. C. A. 9) No. 8386, decided July 22, 1937. The delicate question of the boundary between state and federal power would seem to make proper the presence of the Attorney General of the United States, although the recent legislation requires the opportunity for his presence only where there is presented the constitutionality of a federal statute.[2]

This is a suit in equity brought before a court of three judges pursuant to section 266 of the Judicial Code[3] seeking to have enjoined pendente lite and permanently the enforcement of a statute of the State of California, namely the Use Tax Act of 1935.[4] The defendants are the California State Board of Equalization, the individual members of the board, and the Attorney General of the state. The injunctions are sought on the grounds that the enforcement of the tax in this case will unduly burden the plaintiff's interstate commerce business contrary to the provisions of Article I, section 8, of the Federal Constitution, and that there exists for the plaintiff no adequate remedy at law.

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[1] Taxes are, of course, taken into account in determining a carrier's operating expenses or property valuation for rate fixing purposes. See N. Y. etc., Ry., 97 I. C. C. 273; Great North. R. Co., 133 I. C. C. 1.

[2] H. R. 2260, approved August 25, 1937.

[3] Act of June 18, 1910, 36 Stat. 557, 28 U. S. C. A. sec. 380.

[4] Cal. Stats., 1935, ch. 361.

A temporary restraining order against the enforcement of the tax has been issued. The matter is now before this court on the plaintiff's prayer for interlocutory injunction and the defendants' motion to dismiss the bill. In support of their motion to dismiss the defendants contend that the plaintiff has an adequate remedy at law and that the bill states no ground of relief whatsoever.

Under the assailed tax measure, later considered in detail, the defendants seek to impose against the Southern Pacific Company an excise tax upon the "storage" or "use" of personal property purchased by the company without the State of California, shipped to points within the state and there held, in accordance with predetermined plans, to be installed and made an active part of the company's tangible equipment used within the state for purposes of its inextricably interwoven interstate and intrastate commerce.

The Southern Pacific Company is a corporation of Kentucky engaged as a common carrier by railroad in seven states, including California. Half of its more than 8,000 total mileage is in California. Its gross operating revenue for the calendar year 1935 was more than $124,000,000 of which $63,000,000 was earned on California business. Of this latter figure over $34,000,000 was attributable to interstate commerce.

The specific personal property against the use of which the excise is sought to be enforced consists of a great variety of material necessary for the conduct of plaintiff's intermingled interstate and intrastate business. A portion of it was purchased for integration in plaintiff's railroad system pursuant to an existing maintenance program for the year 1936. The remainder was acquired to have on hand for the recurring demands of maintenance and emergency requirements. Among other articles the property purchased included rails, frogs, switches, valve oil, lumber, stationery and tools. The complaint alleges that the greater portion was specifically designed for use in the operation, maintenance and repair of the road, or "peculiarly adapted to railroad uses * * * and * * * not suitable for any other use." The articles were all required for the efficient and economical conduct of the road.

Concerning the interstate commerce purposes of these purchases, the complaint alleges:

> "Said purchases were made by the plaintiff through the use of its operating capital consisting of money or current assets definitely devoted to the service of transportation, or through the credit of said plaintiff as a railroad engaged in the service of transportation and upon the purchase of said materials and the payment therefor, the expenses therefor are in due course charged into the operating expenses of said carrier to the appropriate accounts for operation, maintenance or repairs, according to the accounting rules and regulations prescribed for railroads engaged in interstate commerce under the provisions and requirements of the Interstate Commerce Act, and that all of said items of tangible personal property so purchased by the plaintiff were devoted to the service of transportation immediately upon their purchase and that upon the purchase of said articles they immediately became a necessary and indispensible part of working capital, material, supplies, equipment and instrumentalities for the operation of said railroad and the said articles and each and all of them became, were and are instrumentalities used indiscriminately and inseparably in the operation, maintenance and repair of plaintiff's railroad for conducting interstate transportation and intrastate transportation from the time the same were purchased therefor, and any storage, use or consumption thereof, which occurred within the State of California cannot be separated or segregated as between intrastate and interstate transportation, the said railroad contemporaneously carrying by means of the same organization and facilities, both intrastate and interstate commerce and said items and materials being from the time of purchase outside the State of California inextricably devoted to and used in service of both classes of commerce."

And further:

> "• • • that prior to any keeping or retention of said materials within the State of California, said ma-

terials were allocated and dedicated to sole and exclusive use in interstate commerce and any keeping or retention thereof within the State of California was and is an inseparable part of the use of said materials and each item thereof in interstate commerce."

The gravamen of these allegations is thus perceived to be that any "keeping" or "storage" of the property within the state is a *use* of the property in interstate commerce preparatory to a *subsequent use* by way of actual physical consumption.

During the three months ending June 30, 1936, the property described in the complaint, purchased outside of and shipped into California, amounted to $1,590,190.62. The use tax assessed on this material totals $47,705.72.

The Act in question imposes an excise tax of three per cent of the sale price upon the storage, use or other consumption of tangible personal property within the state.[5] Leaving out of account the alleged character of the properties as instrumentalities of interstate commerce, the plaintiff's exercise of uses incidental to ownership over them within the state comes within the broad definitions of the statute.[6]

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[5] Cal. Stats., 1935, ch. 361.

"SEC. 3. An excise tax is hereby imposed on the storage, use or other consumption in this State of tangible personal property purchased from a retailer on or after July 1, 1935, for storage, use or other consumption in this State at the rate of three per cent of the sales price of such property.

"Every person storing, using or otherwise consuming in this State tangible personal property purchased from a retailer shall be liable for the tax imposed by this act * * *."

[6] SEC. 2 * * *

"(a) 'Storage' means and includes any keeping or retention in this State for any purpose except sale in the regular course of business of tangible personal property purchased from a retailer.

"(b) 'Use' means and includes the exercise of any right or power over tangible personal property incident to the ownership of that property, except that it shall not include the sale of that property in the regular course of business."

* * * * * * *

Exempt from the operation of the tax are materials protected from excise by the Federal or State Constitution, and material upon which the California three percent sales tax has been paid.[7] Thus it is observed that the use tax is complementary to the sales tax, being designed to reach purchasers who acquire personal property in other states.

If the property taxed is purchased from a retailer maintaining a place of business within the State of California, the purchaser pays the tax to the retailer and the latter pays it to the State Board of Equalization. If the retailer maintains no place of business within the state, the purchaser pays the board directly. In either case returns and payments are due quarterly (sections 6, 7).

In the event of non-payment the board may file with any county clerk a certificate showing due determination of the tax and the failure to pay. Upon such filing the county clerk is required to enter a judgment for the state against the delinquent. The judgment is subject to execution in the usual manner, and in addition it becomes a lien upon any real property owned by the delinquent within the county (section 20). In addition to this procedure, the board is empowered to bring an action in any court of competent jurisdiction to recover the tax at any time within three years after it becomes due (section 28).

The taxpayer is afforded but one remedy to recover taxes illegally exacted. He may pay under protest and bring an action in the state court.[8]

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[7] "SEC. 4. The storage, use or other consumption in this State of the following tangible personal property is hereby specifically exempted from the tax imposed by this act:

"(a) Property, the gross receipts from the sale of which are required to be included in the measure of the tax imposed by Chapter 1020, Statutes of 1933 and any amendments made or which may be made thereto.

"(b) Property, the storage, use or other consumption of which this State is prohibited from taxing under the Constitution or laws of the United States of America or under the Constitution of this State."

* * * * * * *

[8] "SEC. 29. No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding in any court against this State or against any officer thereof to prevent or enjoin under this act the collection of any tax or any amount of tax herein required to be

The bill alleges that the defendants will, unless restrained, take summary action to collect the more than $40,000 alleged to be due upon the property purchased during the quarter ending June 30, 1936. It further states that like or greater amounts of property will be purchased during quarter years to come. Temporary and permanent injunctions are asked against future exactions as well as the claim for the second quarter of 1936.

The defendants' motion to dismiss raises questions which have narrowed to two: (A) Does there exist for the plaintiff an adequate remedy at law? (B) Is the threatened exaction void for repugnance to the Federal Constitution?

(A) We hold that the plaintiff has no adequate remedy at law.

Plaintiff presents several reasons to support its contention that, if the tax is unconstitutional, it has no adequate

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collected; but after payment of any such tax or any such amount of tax herein required to be collected under protest, duly verified and setting forth the grounds of objection to the legality thereof, the retailer or person making the payment may bring an action against the State Treasurer in a court of competent jurisdiction in the county of Sacramento for the recovery of the amount paid under protest. No such action may be instituted more than sixty days after the tax or the amount herein required to be collected and paid to the State becomes due and payable, and failure to bring suit within said sixty days shall constitute waiver of any and all demands against the State on account of alleged overpayments hereunder. No grounds of illegality shall be considered by the court other than those set forth in the protest filed at the time of payment of the tax or the amount herein required to be collected and paid to the State.

"If in any such action judgment is rendered for the plaintiff, the amount of the judgment shall first be credited on any taxes or amounts due from the plaintiff under this act, and the balance of the judgment shall be refunded to the plaintiff. In any such judgment, interest shall be allowed at the rate of six per cent per annum upon the amount found to have been illegally collected from the date of payment of such amount to the date of allowance of credit on account of such judgment or to a date preceding the date of the refund warrant by not more than thirty days, such date to be determined by the Controller.

"In no case shall any judgment be rendered in favor of the plaintiff in any action brought against the State Treasurer to recover any amount paid hereunder, when such action is brought by or in the name of an assignee of the retailer or other person paying said amount, or by any person other than the person who has paid such amount."

legal remedy. It will be necessary to consider only one of the grounds urged, which ground, in our opinion, is controlling.

The Use Tax Act provides but one forum for the recovery by suit at law of taxes paid under protest (Section 29, note 8, *supra*). This forum is "a court of competent jurisdiction in the county of Sacramento". Obviously this provision contemplates a suit only in the state court.

When a bill in equity is brought in a federal court, the test of the adequacy or lack of adequacy of the remedy at law is the legal remedy afforded in the federal court. Where no legal remedy exists in that forum, the remedy at law is inadequate. This conclusion is impelled by a consideration of the nature of the right to sue in the federal courts. It is a substantial constitutional right. Arrowsmith *v.* Gleason, 129 U. S. 86. When one has a cause of action at law, and there exist requisites of federal jurisdiction, his remedy at law is the right to sue in the state or federal tribunal at his election. To deprive him of this choice materially impairs the completeness and adequacy of his remedy.

In Smyth *v.* Ames, 169 U. S. 466, 515, 516, 517, a statute of Nebraska set up a board to prescribe maximum railroad rates. Any railroad deeming itself aggrieved was permitted to bring an action in the supreme court of the state to show that the rates fixed were unjust. If the state court sustained the contention of the railroad it was authorized to issue an appropriate order to the board requiring a correction of the inequity.

Suit was brought by a railroad company in the United States District Court to enjoin the enforcement of the statute. The Supreme Court of the United States held that a case of equity jurisdiction was made out, saying:

> "• • • The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a Federal Court, is not to be conclusively determined by the statutes of the particular State in which suit may be brought. One who is entitled to sue in the Federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity per-

mit such a suit in that court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action. • • • 'A State cannot tie up a citizen of another State, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts'."

In Chicago, B. & Q. Ry. *v.* Osborne, 265 U. S. 14, 16, a railroad company brought suit in the federal court to restrain the collection of taxes levied by the State of Nebraska which taxes were alleged to be unjustly discriminatory. The state law provided a remedy by writ of error to the Board of Equalization from the supreme court of the state. In holding that the taxpayer was authorized to seek federal equity relief, the United States Supreme Court said:

"If an action to recover the payment were allowed, the suit might be brought in the Courts of the United States, under the usual conditions, as well as in those of the State. • • •. But the writ of error, of course, can be sued out only in the State, and a remedy in the State Courts only has been held not to be enough. Smyth *v.* Ames, 169 U. S. 466, 516. St. Louis-San Francisco Ry. Co. *v.* McElwain, 253 Fed. 123, 136. Franklin *v.* Nevada-California Power Co., 264 Fed. 643, 645."

The principle was reaffirmed in Risty *v.* Chicago, etc., Ry. Co., 270 U. S. 378, 388:

"• • • the test of equity jurisdiction in a federal court is the inadequacy of the remedy on the law side of that court and not the inadequacy of the remedies afforded by the state courts. Smyth *v.* Ames, 169 U. S. 466; Chicago B. & Q. R. Co. *v.* Osborne, *supra*."

(B) We hold that the tax sought to be levied upon the plaintiff is an unconstitutional burden on interstate commerce.

The tax in question is laid upon the exercise of certain rights of ownership over personal property; these rights

being enumerated in the broad statutory definitions of "use" and "storage" (footnote 6, *supra*). It is not an *ad valorem* property tax, admittedly valid although the property consists of instrumentalities of interstate commerce, nor is it a tax on the privilege of doing an intrastate business, upheld in Pacific Telephone Co. *v.* Tax Commission, 297 U. S. 403.

The plaintiff does not urge constitutional objections other than the contention that the enforcement here will unduly burden interstate commerce. And even under this heading there can be no objection to the excise on the ground that the materials were imported into the state before the incidence of the tax. Henneford *v.* Silas Mason Co., 300 U. S. 577.

The question narrows, then, to the issue whether at any time after their importation into the State of California, the materials purchased by the plaintiff were not in use in interstate commerce. If they at all times were in actual interstate commerce use or intermixed interstate-intrastate commerce use, that use cannot be subjected to a state tax. It is well settled that such a tax constitutes a forbidden burden on interstate commerce. Helson and Randolph *v.* Kentucky, 279 U. S. 245, 249, 252; Bingaman *v.* Golden Eagle Western Lines, 297 U. S. 626, 628; Cooney *v.* Mountain States Tel. Co., 294 U. S. 384, 393.

By their motion to dismiss the defendants admit the facts pleaded in the complaint. That is, they admit that the items of property they seek to tax "were devoted to the service of transportation immediately upon their purchase", that their financing and accounting was carried on "according to the accounting rules and regulations prescribed for railroads engaged in interstate commerce under the provisions and requirements of the Interstate Commerce Act", that each item was an essential and vital factor in the maintenance and repair of plaintiff's interstate commerce plant, that at all times since their purchase "said materials were allocated and dedicated to sole and exclusive use in interstate commerce and any keeping or retention thereof within the State of California was and is an inseparable part of the use of said materials and each item thereof in interstate commerce."

Thus defendants admit the factual contention that plaintiff's use of the purchased materials at all times since their purchase was a vital use in interstate commerce. Nevertheless they urge that as a matter of law the only interstate commerce use which is free from state taxation is use by way of actual physical consumption or use occurring after the materials have been installed in the operating plant, such as the gasoline being consumed in the Helson and Bingaman cases, or the telephone instruments actually installed in the Cooney case.

The statute specifically exempts property protected from taxation by the Constitution. While this does no more than declare what already is the law, it demonstrates the solicitude of the legislature toward the recognition of constitutional limitations. It indicates that when the legislature defined taxable storage and use it was anxious to insure that interstate commerce use would be protected. Yet defendants would have the statute read:

> "(a) 'Storage' means and includes any keeping or retention in the State * * * of tangible personal property (when such keeping or retention is an inseparable part of the use of such property in interstate commerce, when such property is allocated and dedicated to interstate commerce from the moment of its purchase and is recognized by the Federal Government through the Interstate Commerce Commission as a portion of the capital of the taxpayer used in interstate commerce) * * *."
>
> "(b) 'Use' means and includes the exercise of any right or power over tangible personal property incident to the ownership of that property (which exercise of right or power is a part of the use of such property in interstate commerce prior to a subsequent use by way of consumption) * * *."

We do not believe the statute is thus to be construed. However, if this is the meaning of the act, then we are forced to conclude that it is an unconstitutional exertion of power by the state legislature.

This conclusion is impelled by a realistic approach to the facts presented by the bill. In Pacific Telephone Co. *v.* Tax Commission, 297 U. S. 403, 413, the Supreme Court, dealing with the validity of a state tax, repeated its earlier admonition in Gregg Dyeing Co. *v.* Query, 286 U. S. 472, 480: "The question of constitutional validity is not to be determined by artificial standards."

Whether a use in storage for current consumption is a use in interstate commerce is a question of ultimate fact. Here the court must find or refuse to find this ultimate fact upon the admitted facts and upon those of which it takes judicial notice. It cannot use "artificial standards". It must consider actual business and industrial concepts.

The question is analogous to that presented by a merchandising company's stock for sales in the current season, stored for daily supply of its counters. If such storage is a use other than a merchandising use, what use is it? Or take the case of a canner's stock of cans stored in his plant at the beginning of a fruit season from which stock there is daily withdrawn those required for the arriving fruit. What sort of use is the storage of these cans, if not a canning use?

Certainly any merchandiser or canner or other industrialist or business man would consider it a glaring example of the application of an "artificial standard" to say that such a storage for current consumption was not a use in the business or industry in question. He might well answer: What other business have I in which that storage has any use?

When we view realistically the facts set out in the bill, supplemented with our judicial notice of the practical necessities of a large transportation enterprise, we clearly perceive that this property is used in interstate commerce from the time of its purchase.

Consider first the property purchased for and devoted to a sole, fixed and predetermined use in an existing interstate commerce maintenance program. The storage of such property is a use which is as integral a part of the interstate commerce project as are the rails over which interstate trains are actually running. It is the definite prede-

termined character of its purpose that makes the storage of these purchased articles of equipment as vital to the entire plant before installation as well as afterwards. The situation differs materially from that of the purchase of a body of goods a part or all of which will, in the ordinary turn of events, be used in the future in interstate commerce operations.[9]

It is no answer to say that the plaintiff might change its intention after purchasing and use the property for some purely intrastate purpose not intended at the time of purchase. Granting that such legal right exists, it would be as persuasive to argue that the state might tax the use of an interstate locomotive in operation on the theory that its owner is privileged to use it at any time for a purely local purpose. The question concerns not what the plaintiff might do; it concerns, rather, what the plaintiff is actually doing.

Likewise, property purchased for the sole, fixed and predetermined purpose of serving as "standby" or reserve equipment in an interstate commerce plant is employed in interstate commerce from the time of its purchase. It is almost axiomatic that the far flung system of an interstate railroad cannot be conducted without the presence of reserve supplies. Unpredictable events requiring replacement and repair are of daily occurrence. A flood washes out a section of track. Can it rationally be argued that the rails and ties held in readiness against this emergency are not an integral portion of the company's interstate commerce equipment? One might as well contend that a derail switch is not in use in interstate commerce until an emergency requires it to function.

The distinction which the defendants would have us make between property before and property after installation, whether purchased for an existing necessity or as reserve, strikes us as no more cogent than the argument that the use of a railway station could be taxed because for long periods no interstate trains stop in front of it and no interstate passengers or freight make use of it; or the argument that

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[9] See Nashville, Chattanooga & St. Louis Ry. v. Wallace, *infra*.

the use of a locomotive is taxable by the state during the period in which it is standing idle between interstate trips; or that the telephones held non taxable in the Cooney case, *supra*, should be subject to excise because there were long periods when no interstate calls were being made on any one of them.

In short, a use by way of storage or retention of materials can be fully as vital to interstate commerce as a subsequent use by way of consumption or after installation. A somewhat similar situation is presented by a requirement of pilotage fees which a vessel leaving or entering a harbor must render to a pilot whether or not it avails itself of his services. Pacific Mail S. S. Co. *v.* Joliffe, 2 Wall. 450.

The Federal Government has recognized the interstate character of the use of materials like those described in the complaint through regulations (having the force of law) issued by an administrative agency, the Interstate Commerce Commission.[10] We do not believe that the California Legislature, specifically declaring in section 4 of the Act (note 7, *supra*) its intention to recognize the constitutional prohibition against the taxation of the use of materials in interstate commerce, intended nevertheless to subject to taxation the use of materials not only set apart by the carrier for interstate commerce uses, but recognized as so devoted by the Federal Government.

In a case calling for the determination of whether a particular use of materials is an intrastate or an interstate use, we touch upon the boundary between state and federal

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[10] I. C. C. classification of accounts for steam railroads:

"716. Material and Supplies.

"This account shall include the balances representing the cost, less depreciation, if any, of all unapplied material such as road and shop materials, articles in process of manufacture by the accounting company, fuel, stationery, and dining car and other supplies. In determining the cost of material and supplies suitable allowances shall be made for any discounts allowed in the purchase thereof.

"NOTE.—Balances representing the cost of unapplied construction material and supplies located at the point of use, which have been purchased for projected new roads and extensions, are provided for in road and equipment account No. 47, 'Unapplied construction material and supplies'."

power. The requirement of materials for current repairs and replacement is so obviously a necessity for interstate commerce that no legislation has been needed to compel it. However, the Congress could well pass a statute requiring that:

> "Interstate carriers shall purchase and store for current repairs necessary materials for the efficient conduct of their railways, said *usage* by said carriers of said materials awaiting current installation to be maintained in places convenient to the places of their installation."

To illustrate how our decision in this case may affect the scope of federal power, we assume that the above statute has been passed. In opposition to it we have the instant state use tax act which the defendants would have read:

> "(a) 'Storage' means and includes any keeping or retention in this State for any purpose * * * of tangible personal property (including materials purchased and stored by interstate carriers for current repairs and maintenance necessary for the efficient conduct of their railways) * * *."

The power delegated to Congress under the commerce clause is paramount to the reserved power of the state, when the two come in conflict. Minnesota Rate Cases, 230 U. S. 352, 399; National Labor Relations Board *v.* Santa Cruz Fruit Packing Co. (C. C. A.-9), decided July 31, 1937. Hence in such a conflict of opposing authority presented by the statutes pictured above, this court would be required to indulge every presumption in favor of the Congressional determination that the usage of materials described in both statutes was a use in interstate commerce. Ogden *v.* Saunders, 12 Wheat. 213, 269. Such determination being a reasonable hypothesis, we would be required to accept it as true. Against it the state statute would necessarily fall as invalid. It is because of this possible conflict that we cannot apply the Bushrod Washington doctrine of Ogden

v. Saunders to the state tax legislation challenged in this case.

Conversely, when the state acts within the scope of its reserved powers every presumption is indulged in favor of the validity of its legislation. Such was the case in Pacific Gas & Electric Co. *v.* Sacramento Municipal Utility District No. 8500, recently decided by the Circuit Court of Appeals for the Ninth Circuit.

In support of their contention that the materials in question here are subject to the use tax, the defendants rely strongly on the case of Nashville Ry. Co. *v.* Wallace, 288 U. S. 249, 261, 266. In that case the railroad brought suit in a Tennessee court for a declaratory judgment holding unlawful an excise tax of that state levied upon the storage and withdrawal from storage of gasoline.

The railway purchased the gasoline from points outside the state, brought it into Tennessee and stored it in private tanks. Subsequently all of it was withdrawn from storage to be used as a source of motive power in interstate railway operations. The company assailed the tax both on the ground that the gasoline while stored was still a subject of interstate commerce and on the ground that because of its subsequent use as fuel, the tax was in effect a tax upon the use of the fuel in interstate commerce. The Supreme Court affirmed the highest court of Tennessee in decreeing that the tax was valid. In answer to the railway's first contention it said (p. 266):

> "The gasoline, upon being unloaded and stored, ceased to be a subject of transportation in interstate commerce and lost its immunity as such from state taxation. • • • The fact that the oil was, in the ordinary course of appellant's business, later withdrawn from storage for use, some within and some without the the state, part of it thus becoming again the subject of interstate transportation, did not affect the power of the state to tax it all before that transportation commenced."

In answer to the argument that the tax was one in effect upon the use of gasoline in interstate transportation, it was held (p. 267):

"We cannot say that the tax is a forbidden burden on interstate commerce because appellant uses the gasoline, *subsequent* to the incidence of the tax as an instrument of interstate commerce. Taxes said to burden interstate commerce directly when levied upon or measured by the operation of interstate commerce or gross receipts derived from it, are beyond the state taxing power • • •.

"But interstate rail carriers are not wholly immune from other forms of non-discriminatory state taxation, even though the burden of the tax is thus indirectly or incidentally imposed upon the interstate commerce in which they are engaged. It cannot be doubted that, when the gasoline came to rest in storage, the state was as free to tax it, notwithstanding its *prospective* use as an instrument of interstate commerce, as it was to tax appellant's right of way, rolling stock, or other instruments of interstate commerce, which are subject to local property taxes." (Emphasis supplied.)

Here the Supreme Court makes a finding of ultimate act that the storage was not a use in interstate commerce. The admitted probative facts in that case upon which the inding of ultimate fact was made are not the same as in he instant case. In the case at bar the admitted fact is hat the storage is an *immediate* and not a "prospective se" in interstate commerce.

It is plain from the above quotation that the Supreme Court did not have before it for decision in the Nashville ase the question whether or not the gasoline stored was lready set apart, devoted, and predetermined for use in nterstate commerce before it entered the state. We have tudied exhaustively not only the opinion of the Supreme Court but also the record and briefs in that case. Nowhere lo we find that the gasoline upon entering the State of Tennessee or upon its deposit in the storage tanks was llocated, set apart, and dedicated to interstate commerce ses. Nowhere do we find contention or proof that the tored gasoline was a part of the railroad's current operatng inventory, recognized as such by the Federal Govern-

ment. It was nowhere argued that the gasoline while in the tanks was being used in interstate commerce. As we have already indicated, property is not exempt from state use taxation merely by virtue of the fact that in the ordinary turn of events it will be used in interstate commerce, or the fact that subsequently all of it has been so used. In each case there must be facts, admitted or proved, which show that the keeping or retention is in itself a use in interstate commerce.

What we have said of the Nashville case is equally true of Edelman *v.* Boeing Air Transport, 289 U. S. 249, 251, 253. In that case the taxpayer purchased gasoline within and without Wyoming and stored the same in tanks at its Wyoming airports. It was subsequently withdrawn, some for local sale, some for local use, and some for fueling the taxpayer's interstate airplanes. Wyoming levied an excise tax on the use of gasoline, the incidence of the tax falling on the withdrawal from storage. The taxpayer objected to paying the excise on the fuel withdrawn for interstate planes. The Supreme Court held against the taxpayer, saying that the ruling facts of the case were identical with those in the Nashville decision.

Our examination of the Edelman decision reveals that, as in the Nashville case, there was neither contention nor proof made that the gasoline taxed was set apart or allocated by the taxpayer to an interstate use before it was actually being consumed in the planes; nor any evidence that it was in any way brought under the jurisdiction of the Interstate Commerce Commission. The case is even weaker than the Nashville decision, in view of the fact that when the gasoline was put in storage only an indefinable part of it was subsequently to be used in interstate commerce.

We hold, therefore, that the Nashville and Edelman cases are not controlling on the facts alleged in this complaint. The facts alleged and admitted here bring this case within the principle of the Helson, Bingaman and Cooney cases. In this view it is unnecessary to consider whether the authority of the Nashville and Edelman cases is weakened by Graves *v.* Texas Co., 298 U. S. 393, 401, wherein it was held,

without mentioning the Nashville and Edelman decisions, that a state tax levied on the withdrawal of gasoline from storage for delivery to the United States was void as being an exaction against the activities of the Federal Government.

Reaching a conclusion similar to that of the District Court for Washington, in construing like provisions of a use tax of that state,[11] we hold that the defendants may not constitutionally enforce the provisions of the California Use Tax Act against the plaintiff upon the property set out in the complaint.

The defendants are at liberty, of course, to put the plaintiff to proof of its allegations of present use of the materials as alleged in the bill. And nothing in this opinion bears upon the right of a state to levy a tax upon the intrastate use or property such as that in issue here, under any formula calculated reasonably to apportion the interstate and intrastate commerce uses.

The motion to dismiss the complaint is denied. Plaintiff will be awarded an interlocutory injunction. Plaintiff will prepare and file proposed findings of fact, conclusions of law, and decree.

WILLIAM DENMAN,
U. S. Circuit Judge.
MICHAEL J. ROCHE,
U. S. District Judge.
A. F. ST. SURE,
U. S. District Judge.

[11] Northern Pacific Ry. v. Henneford, 15 Fed. Supp. 302.

APPENDIX "B".

IN THE DISTRICT COURT OF THE UNITED STATES,
NORTHERN DISTRICT OF CALIFORNIA.

IN EQUITY.

No. 4055-R.

SOUTHERN PACIFIC COMPANY, a Corporation, Plaintiff,

v.

JOHN D. CORBETT, FRED E. STEWART, RICHARD E. COLLINS, RAY L. EDGAR, and HARRY B. RILEY, as Members of the State Board of Equalization of the State of California; STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, and U. S. WEBB, the Attorney General of the State of California, *Defendants.*

Before Denman, Circuit Judge, and St. Sure and Roche, District Judges.

DENMAN, *Circuit Judge:*

This case has been submitted under an agreed statement of facts which sustains the pertinent allegations of the bill discussed in our opinion denying the motion for its dismissal. 20 Fed. Supp. 940.

The railway has established that the storage use of the railway materials, solely for its current repairs and renewals and necessary extensions of its intermingled interstate and intrastate enterprise and plant, and without which usage the railways would stop running, is a use in interstate commerce. Hence a tax upon such use is a tax affecting an interstate commerce use—that is, affecting the federal as distinguished from any state function performed by the railway as a public carrier. At the hearing we invited further argument and briefing, but the able presentation on behalf of the State has not answered the question, "In what enterprise other than the intercommingled interstate and intrastate railroading is this use in storage for current re-

pairs and replacements, without which the railroad could not operate?'' Such storage use for current installation is use in interstate commerce in any realistic sense understood by industrialists and merchants (20 Fed. Supp. 943), and could be regarded otherwise only by the application of some "artificial standard" prohibited by Gregg Dyeing Co. v. Query, 286 U. S. 472, 480.

However, since our denial of the motion to dismiss, the Supreme Court has decided three cases dealing with the boundaries of state and federal taxation. Two of them, Western Live Stock *v.* Bureau of Revenue, 82 L. Ed. 548, and Coverdale *v.* Arkansas & Louisiana Pipe Line Co., decided April 4, 1938, significantly expand the area of the states. A third, Helvering *v.* Mountain Producers Corp., 82 L. Ed. 607, explicitly overrules long established concepts determining the respective taxing areas of both governments.

It is suggested by the state's officers that since the thirteenth paragraph of that decision states

> "• • • In the light of the expanding needs of the State and Nation, the inquiry has been pressed whether this conclusion has adequate basis; whether in a case where the tax is not laid upon the leases as such, or upon the government's property or interest, but is imposed upon the gains of the lessee, like that laid upon others engaged in similar business enterprises, there is in truth such a direct and substantial interference with the performance of the government's obligation as to require immunity for the lessee's income."
>
> Helvering *v.* Mountain Producers Corporation, 82 L. ed. 607, 611,

we may be required to reconsider our decision with a view to the expanding needs for revenue of the State of California, and they offer the enactment of the use tax itself as evidence of such need.

In the present emergency of dependent unemployed, California's need for revenue is of sufficient pressure to produce incandescence, but the emitted light does not show where the path of such a principle of determination will lead us.

What light we have on various interstate railways, performing a National public service as important in the body politic as the circulation of blood in the individual, seems to disclose correspondingly "expanding needs" for revenue to meet their expanding payrolls and interest on debt and, here, expanding taxes. Indeed, so pressing are their needs that only by the expanding use of federal funds is their federally regulated function prevented from transfer to federal courts and federal receivers. Already, for many railways, it has been transferred.

We cannot believe that the language of the Mountain Producers case must be interpreted as imposing on us, first, a determination of the need for state taxation, and, if found, second, a reconsideration of our decision on the denial of the motion to dismiss with a view to a reversal of our holding there. Such a criterion would suggest another review and other overrulings if returning prosperity contracts rather than expands the state's need.

We prefer the alternative view of the state's brief that, just as the emergency of the depression and high rentals in the so-called Rent Cases, Block *v.* Hirsh, 256 U. S. 135; Marcus Brown Holding Co. *v.* Feldman, 256 U. S. 170, and Edgar A. Levy Leasing Co. *v.* Siegel, 258 U. S. 242, and also in the much later case of Home Building and Loan Asso. *v.* Blaisdell, 290 U. S. 398, induced the Congress and the Judiciary to the exploration of hitherto unused constitutional powers, so now the urgency of the more recently expanding functions of government in aid of the economic and social needs of the average man, also made poignantly clear by the world depression, requires both legislatures and courts to review the border line between state and federal taxing areas, as that was decided in cases when no such economic and social conditions existed or had been exposed.

Prior decisions considered in the overrulings by the Mountain Producers case present a more definite guide for determining its effect on the decision of this case. Among the cases considered is Indian Oil Co. *v.* Oklahoma, 240 U. S. 522, holding invalid as an unconstitutional burden on a governmental function a tax on Indian land leases owned by

the taxpayer. Here the tax was on the property itself of the taxpayer.

In three other cases, the *income of the taxpayer* from *his* leases is held not taxable. In Choctaw & Gulf R. R. *v.* Harrison, 253 U. S. 292, was held invalid a state tax on the lessee of a mine from the trustee of the mine for Choctaw and Chickasaw Indian tribes, wards of the federal government, based upon his gross sales of his coal. The court held that the lessee was "the instrumentality through which this (governmental) obligation is carried into effect". Such an agency cannot be subjected to an occupation or privilege tax by a state.

In Gillespie *v.* Oklahoma, 257 U. S. 501, the *state* tax on the income of leases owned by the taxpayer was held invalid on the same reasoning, as was the federal tax on the income of the owner of state leases in Burnet *v.* Coronado Oil & Gas Co., 285 U. S. 393.

In all these cases the tax on the taxpayer's property or his income incidental to its ownership is regarded as potentially destructive of the governmental function served by the taxpayer in the exercise of its ownership.

In the Mountain Producers case the tax was upon the *income* from the leases, and the court states the overruling principle to be:

> "• • • And where it merely appears that one operating under a government contract or lease is subjected to a tax with respect to his profits on the same basis as others who are engaged in similar businesses, there is no sufficient ground for holding that the effect upon the Government is other than indirect and remote. We are convinved that the rulings in Gillespie *v.* Oklahoma, 257 U. S. 501, 66 L. Ed. 338, 42 S. Ct. 171, *supra,* and Burnet *v.* Coronado Oil & Gas Co., 285 U. S. 393, 76 L. Ed. 815, 52 S. Ct. 443, *supra,* are out of harmony with correct principle and accordingly they should be, and they now are, overruled."
>
> Helvering *v.* Mountain Producers, *supra,* 613.

However, preceding this sentence regarding taxation on such *income* is another stating the broader principle permit-

ting taxation on *property* of private persons, formerly regarded as having the character of governmental agents because of their leases or contracts with the government. This statement is so significantly joined by the word "and" to the succeeding above quoted sentence, that we are constrained to believe it to be the broader ratio decidendi of the the case. The preceding sentence is (pp. 612, 613):

> "These decisions in a variety of applications enforce what we deem to be the controlling view—that immunity from non-discriminatory taxation sought by a private person for *his property* or gains because he is engaged in operations under a government contract or lease cannot be supported by merely theoretical conceptions of interference with the functions of government. Regard must be had to substance and direct effect." (Emphasis supplied.)

If, then, the private person dealing with the federal government with reference to his property is subject to state taxation, an occupation tax on that person in the *use* of *his* property would seem equally valid.

If this be so, the principle established is inconsistent with that controlling in Graves *v.* Texas Co., 298 U. S. 393, 401, cited by the Railway as controlling here. There a contractor agreed to sell gasoline to the government. It was *his* property until delivery to the government. Prior to delivery it had to be stored and withdrawn from storage. He was taxed by the state of Alabama for this use of storage and withdrawal while still his property.

The court in the Graves case states that this tax increases the government's cost by the amount of the tax levy. However, it seems clear that because the increased cost is so measurable, the principle is no different from the sales tax on the coal in the Choctaw case. It is just as *certain* that the government will receive less for the coal lease as that it will pay more for the gasoline. One is no more direct than the other. Both are levied on the owners of gasoline and coal while the government has no title in either.

Shortly before the Mountain Producers decision was that in Western Live Stock *v.* Bureau of Revenue, 82 L. Ed. 548.

There a non-discriminatory tax on gross receipts from the sale of advertising in a periodical printed in one state and circulated in that and in other states is held valid as on an intrastate activity. The fact that it increases the cost of producing advertising, which has its value because of its interstate circulation, is not controlling.

The latest of these tax cases, decided April 4, 1938, follows normally the trend of these decisions. In Coverdale *v.* Arkansas & Louisiana Pipe Line Co. the party taxed was engaged in the interstate delivery of petroleum gas through a pipe line. It maintained several pumps in the state of Louisiana, the power from which traveled interstate with the gas it moved. The state levied an occupation tax on the use of the pumps, measured by the amount of power going into an intermingled intra and interstate distribution. The court held that because (1) the tax was non-discriminatory and (2) the pump itself was stationary within the state and itself did not move with the power it created, the tax on its use did not have a *direct* effect on interstate commerce and hence was a valid exercise of the state's right to tax.

When California's use tax on the Railroad is considered in connection with the principles established in the preceding cases, we are compelled to the conclusion that the reasoning on which we distinguished it from the cases of Nashville, etc., Ry. v. Wallace, 288 U. S. 249, and Edelman *v.* Boeing Air Transport Co., 289 U. S. 249, is not controlling. It is true that the standby material here stored for the necessary maintenance of a great interstate railway *is dedicated* to an interstate use, but so are the pumps in the Coverdale case. Railways could not run unless their spare parts and maintenance supplies were used in the storage from which they were currently drawn, but neither could the gas and oil be driven in interstate commerce unless the owner used the pumps.

For the purposes of this case the dividing line is the same as in the Nashville and Edelman cases, even though in those cases there was no proof that the fuel was dedicated to an exclusive use to create power in interstate transportation. It is that the storage use and withdrawal use

are prior to the actual installation of the parts and rails in the locomotive and cars and in the roadbed. Until then the increased cost, although it is paid by the passengers and freight owners, is an "*indirect*" burden on interstate commerce. Did not the Coverdale case seek to distinguish between the Nashville and Edelman cases and Helson *v.* Kentucky, 279 U. S. 345, we should be inclined to hold that the latter case was overruled and, though a direct burden, the tax was as valid as the direct *ad valorem* tax on the railroad's property itself. In logic, as pointed out by Mr. Justice Stone in his concurrence in the Helson case, the one is as justifiable a method of collecting from the railway what it owes the state government for its services in state governmental protection, as is the other.

We find the facts to be as stipulated and agreed by the parties. From those facts we conclude that the threatened enforcement of the California Use Tax Act will not impose a direct or undue burden on plaintiff's interstate commerce business.

The permanent injunction is denied and the bill dismissed.

WILLIAM DENMAN,
United States Circuit Judge.
MICHAEL J. ROCHE,
United States District Judge.
A. F. ST. SURE,
United States District Judge.

May 3, 1938.

[Endorsed:] Statement of jurisdiction. Filed Jun. 21, 1938.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1938

No. 212

SOUTHERN PACIFIC COMPANY
(a corporation),
Appellant,

vs.

JOHN C. CORBETT, FRED E. STEWART, RICHARD E. COLLINS, WILLIAM G. BONELLI and HARRY B. RILEY, as members of the State Board of Equalization of the State of California, STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, and U. S. WEBB, the Attorney General of the State of California,
Appellees.

BRIEF FOR APPELLANT.

OPINIONS BELOW.

The opinions of the District Court are reported in 20 Fed. Supp. 940 (on motion to dismiss) and 23 Fed. Supp. 193 (on final hearing).

JURISDICTION.

Appellant has filed a statement relating to jurisdiction in accordance with Rule 12 of the Rules of this Court and probable jurisdiction has been noted.

STATEMENT OF THE CASE.

This action was instituted by the appellant to enjoin the appellees, state officers, from enforcing the California Use Tax Act of 1935 (Cal. Stats. 1935, ch. 361, p. 1297), hereinafter referred to as Use Tax Act, with respect to property purchased by appellant outside of the State of California and used by it within said State and in other states in the operation of its inextricably intermingled intrastate, foreign and interstate railroad transportation business. Injunction was prayed for on the grounds, first, that imposition of the tax under said Act, as construed and sought to be applied by appellees, would impose a direct and undue burden on appellant's interstate transportation business in violation of the commerce clause of the federal Constitution; and, second, that imposition of said tax under said Act, as construed and sought to be applied by appellees, on appellant's uses of property partly and inseparably within and without the State of California, on uses outside the State and on uses relating to operations outside the State, in conducting appellant's interstate and foreign transportation business, would be extraterritorial in its operation and effect and would impose a tax upon uses of property beyond the limits of the State of

California in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

A District Court of three judges (Jud. Code, sec. 266; U.S.C. 28:380) denied a motion to dismiss the bill and awarded an interlocutory injunction, holding the tax in question to be a direct, undue and unconstitutional burden on interstate commerce (R. 46, 63). On final hearing the case was submitted on agreed facts (R. 71-93), and the Court found that such agreed facts sustained the pertinent allegations of the bill (R. 94, 100 et seq.).

The agreed facts, as hereinafter summarized, show that the tax in question is a flat-rate excise tax, measured by a percentage of the purchase price, sought to be imposed directly upon the privilege of using instrumentalities in carrying on and conducting inseparably appellant's intrastate, foreign and interstate railroad transportation business. The whole measure of the tax is sought to be imposed upon the privilege of making any storage, use or other consumption of tangible personal property within the State of California, without apportionment as between intrastate, interstate and foreign transportation uses, and without apportionment as to uses wholly within and uses inseparably within and without the State, or uses relating to operations outside the State.

Notwithstanding such facts, the Court reversed the ruling of law made in its first opinion and concluded that the threatened enforcement of the Use Tax Act would not impose a direct or undue burden on appel-

lant's interstate commerce business, and entered a final decree denying a permanent injunction and dismissing the bill. It failed and refused to make any finding and conclusion of law as to the alleged denial of due process (R. 94, 131, 100, 128-131).

From that decree this appeal is prosecuted.

SUMMARY OF FACTS.

The Use Tax Act as here applied imposes an excise tax directly upon one engaged in carrying on interstate and foreign transportation business for the privilege of making necessary use of tangible personal property in the performance of such business (R. 1, 65, 9-19). Section 3 of the Act, so far as material, provides:

> "An excise tax is hereby imposed on the storage, use or other consumption in this State of tangible personal property purchased from a retailer on or after July 1, 1935, for storage, use or other consumption in this State at the rate of three per cent of the sales price of such property.
>
> "Every person storing, using or otherwise consuming in this State tangible personal property purchased from a retailer shall be liable for the tax imposed by this act, and the liability shall not be extinguished until the tax has been paid to this State; * * *."

Section 2(a) defines "storage" as "any keeping or retention in this State for any purpose except sale in the regular course of business of tangible personal

property purchased from a retailer". Section 2(b) defines "use" as "the exercise of any right or power over tangible personal property incident to the ownership of that property, * * *." Section 2(j) defines "in this state" as "within the exterior limits of the State of California, * * *."

Section 4 contains a number of exemptions, one relating to property the gross receipts from the sale of which are taxed by the California Retail Sales Tax Act (Cal. Stats. 1933, ch. 1020, p. 2599). The effect of this exemption is to make the use tax applicable only to tangible personal property purchased outside the State of California. The Act is fully summarized, with pertinent quotations, in the bill of complaint (R. 1, 65, 9 et seq.).

Appellant, a Kentucky corporation, operates as a common carrier of freight and passengers, a system of railroads extending from points within the State of California into other states (R. 100, 101).

Appellant's railroad is contemporaneously, inseparably and inextricably devoted to the services of intrastate, interstate and foreign transportation and commerce, the same rails, the same facilities, and the same organization being devoted to and used inseparably for all three classes of commerce (R. 100, 103, 105).

Appellant purchases the tangible personal property in question for the sole, fixed and predetermined purpose of use in conducting its said transportation business and will continue to purchase like property for such purpose, and so uses the same (R. 106, 118, 119).

The money used for the purchase of said property is operating capital devoted to the service of transportation and all of said purchases are made through the use of such operating capital. The expenses therefor are charged to the appropriate accounts for operation, maintenance or repairs, or other proper account, according to the accounting rules and regulations prescribed for railroads engaged in interstate commerce under the provisions and requirements of the Interstate Commerce Act (R. 106-110).[1]

Materials and supplies and working capital are classed in railway accounting practices, as prescribed by the Interstate Commerce Commission, as railway operating property. The working capital and materials and supplies carried in said accounts are and were a part of appellant's railway operating prop-

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1. Southern Pacific Company is and was subject to valuation by the Interstate Commerce Commission under the Interstate Commerce Act. Its valuation for rate-making purposes was made by the Interstate Commerce Commission and is duly reported in Volume 45 of Interstate Commerce Commission Valuation Reports, page 1 (decided June 10, 1933). Working capital allowed in said valuation was $19,022,826.00, segregated as follows:

Account 706—Cash	$ 5,277,896.00
Account 716—Material and supplies	13,744,730.00

The sum of $27,760,966.88, the amount of working capital as of June 30, 1936, is the approximate amount of working capital devoted to the service of transportation by the appellant at the times pertinent to this action (R. 107, 108).

Numerous authorities support the proposition that working capital and materials and supplies are operative property.

Texas Midland Railroad, 75 I.C.C. 1, 34, held as follows:

"The property of a railroad which is necessary in operation may be divided into two general classes—the plant itself and its operating assets. * * * Operating assets include materials and supplies and cash on hand."

Cumberland Tel. & Tel. Co. v. City of Louisville, 187 Fed. 637 (reversed in part, 225 U.S. 430); *New York & Richmond Gas Co. v. Prendergast*, 19 F.(2d) 167, 177; *Chesapeake & Potomac Telephone Co. v. West*, 7 F. Supp. 214, 224; *New York Telephone Co. v. Prendergast*, 36 F.(2d) 54, 64; *Greenager, Public Utility Rate Making*, p. 123; *Whitten, Valuation of Public Service Corporations*, p. 287.

If the working capital with which purchases are made is devoted to the service of interstate transportation, it follows that the materials and supplies and other property purchased with that capital and for the predetermined purpose of railway operation and maintenance are necessarily devoted to the same service from the moment of their purchase.

erty. Immediately upon the purchase of said property it becomes subject to accounting in the manner and form hereinbefore described (R. 106-110).

The property is of two general classes (a) property purchased to carry out a predetermined renewal or replacement of track, equipment, facilities, or structures in the existing transportation plant (R. 110), and (b) materials for current maintenance, or for use or consumption in conducting current operations, including stand-by materials (R. 110). The major part of the property consists either of articles especially designed and manufactured upon approved specifications for railroad uses, or of articles manufactured upon appellant's particular specifications to meet its particular needs and purposes. Generally such property is unfit for other purposes or cannot be economically used for other purposes (R. 110-112).

As a matter of practical economy, all purchases are made on the basis of estimates and requisitions to meet current requirements and are restricted to the least practical quantities required for imminent future uses (R. 112 et seq.).[2]

In the interest of prompt and efficient public service and in the performance and discharge of its legal obligations to the public as a common carrier by rail-

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2 The courts and the Interstate Commerce Commission have held repeatedly that property held for imminent use in conducting interstate transportation is devoted to the service of interstate commerce while so held.
Re Texas Midland Railroad, 75 I.C.C. 1, 161, 162;
Jersey City v. Board of Equalization of Taxes, 74 N.J.L. 382;
Chicago, etc. R. Co. v. Douglas County, 122 Wis. 273;
State v. Great Northern Ry. Co., 171 N.W. 317, 142 Minn. 173;
Pere Marquette R. Co. v. Ludington, 133 Mich. 397;
Philadelphia etc. Ry. Co. v. Woodbridge, 102 Atl. 392, 91 N.J.L. 180;
Brooklyn Borough Gas Co. v. Prendergast, 16 F.(2d) 615, 626;
Indianapolis Water Co. v. McCart, 89 F.(2d) 522, at 524

road, appellant is required and compelled to have supplies and facilities distributed over its entire line of railroad in quantities and at the times necessary to anticipate regular current requirements, and to have such reserves in quantities necessary to meet constantly fluctuating demands and emergencies which result from changes in the volume of business handled, traffic accidents, wrecks, weather conditions, washouts, and unforeseen operating conditions which commonly affect a railroad, and to meet the ordinary wear and tear which occur in connection with the use of its railroad and facilities (R. 117-120).

All property purchased as aforesaid is handled from the time the same reaches the rails of the appellant, as company materials, on company material waybills and on free billing, and all of such property when received by appellant as purchaser and thereafter handled by it in distribution over its lines of railroad, is likewise handled on free company billing (R. 113).[3]

The purchasing, handling and distribution of all such property is by the operating personnel of the railroad and at railroad expense, and all handling thereof is upon railroad operating property (R. 112, et seq.).

At no time is the property a part of a commercial stock in trade offered for sale or sold and no part thereof was purchased or held for any purpose or

3. Paragraph 8, section 1 of the Interstate Commerce Act forbids transportation of commodities, with certain exceptions, owned by the railroad, except such articles or commodities as are necessary and intended for its use in the conduct of its business as a common carrier.

purposes other than those herein described (R. 119, 120).

No storage, use or other consumption of any character is made of the property so purchased for appellant's operating uses except as an integral, inseparable and indispensable part of conducting transportation (R. 100-127). There is no storage of the property prior to its use in transportation (R. 100-127, 46, 55, et seq., and final opinion 94).

By reason of its inextricably intermingled interstate, foreign and intrastate commerce and business, plaintiff is compelled to purchase from points outside of California and to use and consume a greater amount of tangible personal property than it would be required to purchase if it were engaged only in intrastate railroad transportation business. Wear and tear and materials consumed have a relation to the tonnage moved (R. 126).

At San Francisco, California, are located the general stores and purchasing departments of the company (R. 103, 104). In addition to the main stores and material yards in California, appellant maintains storehouses, storerooms and materials yards and other places of storage all along its lines of railroad at principal terminals, at division points or at stations. Such places for the holding and detention of railway materials and supplies are parts of a unified distribution system (R. 112-114). Purchasing in quantities through a central purchasing department, transportation in single lots to a single destination, and issuance of materials and supplies from terminal points, con-

stitute the normal and economical method of providing railway materials and supplies; hence, appellant purchases the property in question for direct delivery to California receiving points for redistribution over its lines (R. 103, 104, 106, 112 et seq.).

The general railroad administrative offices and general repair and maintenance shops and yards are located within California. At those points some of the property in question is used for the benefit of the entire system. Such use is not complete in California (R. 5, 7, 8, 66, 103, 104, 112 et seq.).

The appellees, officers of the State of California, and citizens and residents thereof (R. 126, 127), have demanded payment of the taxes aforesaid under the provisions of Ruling No. 11 of the appellee, State Board of Equalization, which is as follows:

> "The fact that tangible personal property is purchased in interstate or foreign commerce does not exempt from the tax the storage, use or other consumption of such property in this State after the shipment of the property in interstate or foreign commerce has ended.
>
> "The fact that tangible personal property is used in this state in interstate or foreign commerce following its storage in this State does not exempt the storage of the property from the tax. The tax does not apply to the use or storage of property purchased for use in interstate or foreign commerce and actually placed in use in interstate or foreign commerce prior to its entry into this State" (R. 126, 127).

Such tax would be a direct charge to the cost of conducting transportation (R. 110, 47; final opinion, 94).

SPECIFICATION OF ERRORS.

The Court erred:

1. In concluding that the imposition of the California use tax upon the acts and transactions found to have occurred with respect to the tangible personal property described in findings of fact would not be a direct burden upon the interstate commerce and business of the appellant and would not be contrary to or in violation of the provisions of Clause 3 of Section 8 of Article I of the Constitution of the United States and the rights, privileges and immunities of the appellant thereunder.

2. In concluding that by reason of the facts found, appellant's application for a permanent injunction should be denied and the bill of complaint should be dismissed.

3. In refusing to make the conclusion of law requested by the appellant that the purchases of tangible personal property involved in this action were made with funds classified as railway operating capital and that the property purchased with such capital was classified as railway operating property from and after the time of its purchase.[1]

4. In refusing to make the conclusion of law requested by the appellant that all of the tangible personal property involved in this action was purchased for the sole, fixed and predetermined purposes of using the same for carrying on appellant's intermixed and inseparable intrastate, interstate and foreign trans-

1. Findings of fact and conclusions of law requested by appellant are shown in record pages 128-131.

portation business and that said property was devoted to the service of transportation and use in carrying on said business from the time of its purchase.

5. In refusing to make the conclusion of law requested by the appellant that any and all storage of the tangible personal property involved in this action made by the appellant within the State of California was not a storage separate or separable from and antecedent to appellant's use in carrying on its intermingled and inseparable intrastate, interstate and foreign transportation business, but was an inseparable part of use in carrying on such business.

6. In refusing to make the conclusion of law requested by the appellant that the tangible personal property purchased for and devoted to appellant's use as materials and supplies for the current operation, repair and renewal of its existing railway transportation plant was for an integral use in appellant's interstate commerce operations and at all times from and after the date of purchase and transportation into the State of California, the storage, use or other consumption of said property by appellant constituted a use in interstate commerce.

7. In refusing to make the conclusion of law requested by the appellant that the tangible personal property purchased for and devoted to an existing renewal and maintenance program was for an integral use in appellant's interstate commerce operations and at all times from and after the date of

purchase and transportation into the State of California, the storage, use or other consumption of such property by appellant constituted a use in interstate commerce.

8. In refusing to make the conclusion of law, requested by the appellant, that the appellant had established that the storage of the tangible personal property involved in this action, solely for its current repairs and renewals and necessary extensions of its intermingled interstate and intrastate enterprise and plant, was a use in interstate commerce.

9. In refusing to make the conclusion of law, requested by the appellant, that the tax proposed to be assessed upon such use is a tax directly upon an interstate commerce use or function.

10. In refusing to make the conclusion of law, requested by the appellant, that the imposition of the said use tax upon storage within California would impose a tax extraterritorial in its operation and would reach to and impose a direct tax and a direct burden upon ultimate uses and consumption in other states of the property so stored or of an inseparable part thereof.

11. In refusing to make the conclusion of law, requested by the appellant, that the use taxes sought to be imposed upon appellant by the appellees under the said Use Tax Act on account of the storage, use or other consumption of the tangible personal property in question, are direct taxes upon operative in-

strumentalities of interstate commerce, a direct burden of expense chargeable to such commerce, and an unconstitutional burden on interstate transportation and interstate commerce, contrary to and in violation of the provisions of Article I, Section 8, Clause 3 of the Constitution of the United States.

12. In refusing to make the conclusion of law requested by the appellant that the said Use Tax Act, as construed and applied by appellees so as to impose a tax on the acts or transactions found to have occurred with respect to the tangible personal property described in said findings of fact, is contrary to and in violation of the provisions of Article I, Section 8, Clause 3, of the Constitution of the United States, and the rights, privileges and immunities of the appellant thereunder.

13. In refusing to make the conclusion of law, requested by the appellant, that the defendants might not constitutionally enforce the provisions of said Use Tax Act against the appellant upon the tangible personal property described in the findings of fact and that appellant was entitled to a permanent injunction.

14. In failing and refusing to make the conclusion of law based upon and justified by the findings of fact herein, that the imposition and collection of the said tax effectuates a taking of appellant's property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

15. In deciding, adjudging and decreeing that appellant's application for a permanent injunction should be denied.

16. In deciding, adjudging and decreeing that appellant's bill of complaint should be dismissed.

ARGUMENT.

Summary of Argument.

The trial Court rendered two opinions in this case. The first upheld the sufficiency of the bill of complaint and decided that the tax assailed constituted a direct, undue and unconstitutional burden on interstate commerce, and that conclusion, we submit, was correct. In its final opinion, after making findings of fact showing the direct manner of imposition of the tax upon the appellant's privilege of using instrumentalities of interstate commerce, and stating that the stipulated facts sustained the allegations of the bill of complaint, the Court reversed its earlier opinion and decided that the threatened enforcement of the Use Tax Act would not impose a direct or undue burden on plaintiff's interstate commerce business. The cases of *Western Live Stock v. Bureau*, 303 U. S. 250; *Coverdale v. Pipe Line Co.*, 303 U. S. 604, and *Helvering v. Producers Corp.*, 303 U. S. 376, decided subsequent to the denial of the motion to dismiss the bill, were cited in support of the Court's reversal of its earlier opinion.

We submit that none of those cases is in point and that there is no precedent on which the Court's reversal of its earlier opinion can be based.

Under the doctrine of *Helson and Randolph v. Kentucky,* 279 U. S. 245, which was reaffirmed in *Bingaman v. Golden Eagle Lines* (1936), 297 U. S. 626, and was recognized in *Coverdale v. Pipe Line Co.,* supra, state statutes directly taxing the use of instrumentalities of interstate commerce are unconstitutional as in violation of the commerce clause.

Under *Cooney v. Mountain States Tel. Co.* (1935), 294 U. S. 384, a state excise tax cannot validly be applied indiscriminately and without apportionment to an instrumentality common to interstate and intrastate commerce.

The case at bar is distinguished by its facts from the cases in which the privileges taxed were not acts of conducting interstate transportation.

The unconstitutionality of state excise taxation burdening interstate commerce is not avoided by imposing state taxes at an equal rate on intrastate commerce or other intrastate privileges.

This Court has consistently ruled that where a tax upon the privilege of engaging in interstate commerce is directly imposed, the resulting burden is direct and therefore imposes an undue and unconstitutional burden on interstate commerce.

The tax involved in this case is discriminatory in its operation and effect, and if the decision of the lower Court is sustained the way will be open for

serious discriminatory abuses in state and municipal taxation of the instrumentalities of interstate commerce.

The taxation of the use of property, inseparably used by a railroad interstate carrier in the transaction of its transportation business, both within and without the State of California, without apportionment, would be extraterritorial in its operation and effect and in violation of the due process clause of the federal Constitution.

I.

A STATE EXCISE TAX IMPOSED DIRECTLY UPON THE PRIVILEGE OF USING INSTRUMENTALITIES IN CARRYING ON AND CONDUCTING INTERSTATE AND FOREIGN TRANSPORTATION AND COMMERCE BY A RAILROAD COMMON CARRIER, IS A DIRECT BURDEN ON SUCH TRANSPORTATION AND COMMERCE, CONTRARY TO THE PROVISIONS OF ARTICLE I, SECTION 8, CLAUSE 3, OF THE CONSTITUTION OF THE UNITED STATES.

This proposition is well established:

Bingaman v. Golden Eagle Lines, 297 U. S. 626;

Helson and Randolph v. Kentucky, 279 U. S. 245;

East Ohio Gas Co. v. Tax Commission, 283 U. S. 465;

Ozark Pipe Line v. Monier, 266 U. S. 555;

Oklahoma v. Wells, Fargo & Co., 223 U. S. 298;

Galveston, H. etc. Ry. Co. v. Texas, 210 U. S. 217;

Philadelphia SS. Co. v. Pennsylvania, 122 U. S. 326;

Fargo v. Michigan (Fargo v. Stevens), 121 U. S. 230;

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 214;

United States Airways v. Shaw (1930), 43 F. (2d) 148;

Mid-Continent Air Express Corporation v. Lujan (1931), 47 F. (2d) 266;

Puget Sound Co. v. Tax Commission, 302 U. S. 90;

Minot v. Philadelphia, W. & B. R. Co., 17 Fed. Cas. 458, Fed. Case No. 9645, aff. 18 Wall. (85 U. S.) 206;

Pullman Southern Car Co. v. Nolan (C. C.), 22 Fed. 276, 280, 281, aff. sub. nom. *Pickard v. Pullman Southern Car Co.,* 117 U. S. 34, 46.

The Pacific Telephone & Telegraph Company v. Henneford (July, 1938), ... Wash. ..... 81 Pac. (2d) 786.

The Act in question specifically states that the tax imposed on the storage, use or other consumption of tangible personal property, etc., is an "excise tax" (R. 9, 10), and the trial Court so ruled (R. 50).

II.

A STATE EXCISE TAX CANNOT VALIDLY BE APPLIED INDISCRIMINATELY AND WITHOUT APPORTIONMENT TO AN INSTRUMENTALITY COMMON TO INTERSTATE AND INTRASTATE COMMERCE.

The same organization, the same lines of track, the same rolling stock and the same materials and supplies are employed and used inseparably in conducting all classes of railroad transportation. The same train carries local and interstate freight or local and interstate passengers.[5]

Under *Cooney v. Mountain States Tel. Co.* (1935), 294 U. S. 384, a state excise tax cannot validly be applied indiscriminately and without apportionment to an instrumentality common to interstate and intrastate commerce. Numerous cases supporting that proposition are cited in the Court's opinion in that case and that principle is sustained in *Adams Mfg. Co. v. Storen* (1938), 304 U. S. 307, 314.

5. Mr. Justice Brandeis delivering the opinion of the Court in *Colorado v. United States*, 271 U. S. 153, said:

"This railroad, like most others, was chartered to engage in both intrastate and interstate commerce. The same instrumentalities serve both. The two services are inextricably intertwined. The extent and manner in which one is performed necessarily affects the performance of the other."

See also to the same effect the case of *Railroad Commission v. C. B. & Q. R. Co.*, 257 U. S. 563.

III.

THE CASE AT BAR IS DISTINGUISHED BY ITS FACTS FROM THE CASES IN WHICH THE PRIVILEGES TAXED WERE NOT ACTS OF CONDUCTING INTERSTATE TRANSPORTATION.

In the case at bar, the trial Court expressly found the use of property in question to be an integral and inseparable part of use in conducting transportation. All storage of current railway materials, etc., is an act of such use (R. 100-127, 46, 55 et seq., and final opinion 94).

In *Edelman v. Boeing Air Transport,* 289 U. S. 249, the tax there in question was upheld on the theory that the privilege taxed was one which was wholly exercised and completed before use in carrying on interstate commerce commenced. That decision was based upon an express finding of fact that the act of "withdrawal" from storage, which was the privilege taxed, was completed before any use in interstate commerce was commenced. A reference to the decision of the lower Court in that case (*Boeing Air Transport, Inc. v. Edelman,* 61 F. (2d) 319), is enlightening in distinguishing the facts of that case from the facts of the case at bar. The lower Court's opinion contains the following recital of facts:

> "Appellant procures gasoline from both inside and outside the State of Wyoming; after it is purchased part of it is brought to Cheyenne and part to Rock Springs and stored in tanks *for use at appellant's direction* and *subject to any use it wishes to make of it;* there is one tank at Rock Springs and two at Cheyenne; the capacity of one

> of the tanks at Cheyenne is five thousand gallons and the other two thousand gallons; *appellant sells some gasoline* at Cheyenne and at Rock Springs; *it displays a price sign at each place, stating the price of gasoline including the tax;* other planes use both of these fields, *and appellant uses gasoline locally at each field in trucks, automobiles, for testing purposes, and washing planes; there is no separate receptacle* at either field *in which appellant stores the gasoline which it sells to other airships,* or buys outside Wyoming; it is all put into the storage tanks; there are gauges on the pumps, and a record was kept each time that gasoline was drawn from the tanks; the amount used locally by appellant, or sold, is in this way kept separately from the amount used by appellant in its interstate flights; it likewise measures the gasoline put into its planes for interstate commerce use." (Emphasis supplied.)

Under those facts, it could not reasonably have been argued that the storage followed the devotion of the gasoline to interstate transportation service, but as the Court held, the storage in that case completely preceded any devotion of the gasoline to or use of it in interstate commerce. The whole supply constituted a commercial stock in trade and the storage of that portion subsequently withdrawn for use in the owner's interstate planes was merely incidental and no part of the gasoline was by any overt act, declared intention or predetermination, devoted to interstate service until the time of its actual withdrawal from the common supply.

In *Nashville, C. & St. L. Ry. v. Wallace,* 288 U. S. 249, this Court decided that the privilege which was taxed was completely exercised before interstate use commenced. The facts of that case, as we take them from the opinion, were as follows:

Appellant, an interstate rail carrier, made purchases of large quantities of gasoline outside the State of Tennessee and brought it into the State in tank cars from which it was unloaded and placed in its own storage tanks. None of it was sold by the appellant but all was withdrawn and used by it as a source of motive power in interstate rail operations in Tennessee, Kentucky, Alabama and Georgia. Storage in that case was a preliminary step to use in interstate commerce. Neither the appellant, the shippers, nor the carrier, at the time of the shipment of the gasoline from points of origin, arranged a destination for any part of the oil other than the appellant's storage tanks in Tennessee. Although in the usual course of business a *variable* and *undefined* part of it, *when segregated for that purpose,* would again be transported across state boundaries, *appellant was free to distribute the oil either within or without the state for use in its business or for any other purpose.*

That appears to be the whole of the facts upon which the opinion was predicated.

The demurrer to the complaint assumed a state of facts showing the storage of gasoline in storage tanks at Nashville, Tennessee, for *future distribution and use* throughout several states in the operations of an

interstate railroad, and it was argued that neither the purchaser's intention for future use, nor an ultimate future use, prevented the imposition of the tax. That this Court's decision rested upon such facts is shown by the following excerpts from the opinion:

> "We cannot say that the tax is a forbidden burden on interstate commerce because appellant uses the gasoline, *subsequent to the incidence of the tax,* as an instrument of interstate commerce. * * *
>
> "There can be no valid objection to the taxation of the exercise of any right or power incident to appellant's *ownership* of gasoline, *which falls short of a tax directly imposed on its use in interstate commerce,* deemed forbidden in Helson v. Kentucky, supra.
>
> "Here the tax is imposed on the successive exercise of two of these powers, the storage and withdrawal from storage of gasoline. Both powers are *completely exercised before use of the gasoline in interstate commerce begins. The tax imposed upon their exercise is, therefore, not one imposed on the use of gasoline as an instrument of commerce."* (Emphasis supplied.)

In deciding the case at bar the Court expressly declared that "the railway has established that the storage use of the railway materials solely for its current repairs and renewals * * * and without which usage the railways would stop running, is a use in interstate commerce" (R. 94). In the first opinion, considering facts related in the bill which the Court later found were sustained by the agreed facts, the

case at bar was distinguished by its facts from the *Nashville* case and *Edelman v. Boeing Air Transport*, the Court saying that the items of property sought to be taxed were devoted to the service of transportation immediately upon their purchase and that any keeping or retention thereof within the State of California was an inseparable part of the use of said materials and each item thereof in interstate commerce and that the situation differs materially from the facts on which those cases were decided (R. 60-62).[6]

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6. We wish to enumerate by way of emphasis some of the distinctions between the facts upon which the *Nashville* case was decided, as recited in the opinion, and the facts of the case at bar:

(a) In the *Nashville* case, while it does appear that none of the gasoline in question was sold and all of it was subsequently used as a source of motive power in interstate railway operations, there is nothing whatever in the facts recited in the opinion to connect the stored gasoline with an unequivocal use in interstate railway operations as are the facts in this case. On the contrary, the opinion expressly declared that the appellant was free to distribute the oil either within or without the State for use in its business *or for any other purpose.*

(b) The opinion recites no facts showing that the gasoline had been purchased for the predetermined purpose of use in conducting transportation. In the case at bar the findings of fact show that the tangible personal property in question was purchased for the sole, fixed, exclusive and predetermined purpose of transportation use.

(c) There are no facts noticed in the opinion in the *Nashville* case showing that the gasoline was purchased with railroad operating capital; or that it became, immediately upon its purchase, subject to classification as railway operating materials and supplies definitely devoted to the service of transportation; or that it was a part of the carrier's investment upon which it was entitled to earn a fair return, and that this status became fixed before the time of the incidence of the tax.

(d) There are no facts noticed in the opinion in the *Nashville* case showing that the railway storage tanks were in themselves a part of the railway operating transportation plant or that the storage and handling of gasoline into and out of such storage and the distribution thereof over the carrier's lines of railway for operating purposes were all an essential and inseparable part of the conducting of transportation.

(e) The opinion takes no notice of any facts showing that the gasoline in question was handled or subject to handling in all respects as company material and that the carrier could not have enjoyed the economy of the free billing of such gasoline over its lines in distribution for use in conducting transportation without first having dedicated the same to that service.

(f) No fact appears in that case, as appears in the case at bar, showing that a large part of the property in question was especially designed for specific railroad purposes and not practically adapted to any other use. The commodity which was involved in the *Nashville* case is not typical of railroad materials and supplies generally used for railroad operation and main-

The opinion in the *Nashville* case clearly accepts the proposition that goods which are presently being used in conducting interstate transportation, are not subject to State taxation for such privilege. That principle is recognized in the express reference to *Helson v. Kentucky,* supra, in distinguishing between present and prospective use of commodities in conducting transportation.

In deciding the case of *Coverdale v. Pipe Line Co.,* 303 U. S. 604, this Court placed it in the category of the cases of *Nashville, C. & St. L. Ry. v. Wallace, Edelman v. Boeing Air Transport,* and *Gregg Dyeing Co. v. Query,* 286 U. S. 472, as involving the taxation of an intrastate event. The event held to be taxable

tenance. It is not a material which by virtue of its character raises a presumption that it is intended for and dedicated to a railroad use, but, on the contrary, gasoline is a commodity subject to merchandising and general uses. Some affirmative evidence indicating a definite act of dedication of that kind of material to such service is essential. Had it been shown that the gasoline had been purchased with railroad operating capital, that overt act would have classified the material as being devoted to the service of transportation immediately upon its purchase and before its incidental storage for subsequent consumption in railway operations. A commercial supply of gasoline might be taxable notwithstanding the fact that some part of it might subsequently be sold or used for power for carrying on interstate transportation; but those facts are different from a storage of materials which have already been set apart, allocated and dedicated by the common carrier itself for current maintenance and operating supplies for conducting interstate transportation. The item of gasoline is not within the issues of the case at bar since it is not purchased in interstate commerce for railroad use in California.

(g) The opinion in the *Nashville* case contains no recital of facts showing that the gasoline on hand was not in excess of a reasonable amount for imminent future uses. Even the cash on hand and cash assets of a railroad are subject to differentiation as between that part which is classified as working capital, subject to regulation, and that part in excess of working capital, taking a non-carrier classification not subject to regulation. The evidence in that case clearly failed to meet the test repeatedly laid down by the authorities, of showing the imminence of future use. The large supply held at one central location and not distributed over the lines at points of convenient use and not shown to be in a process of distribution, was clear evidence to the contrary.

(h) The facts in the *Nashville* case, contrary to those in the case at bar, do not show the extraterritorial operation and effect of the tax on the storage of materials ultimately used in relation to operations extending over state lines.

by the State was the manufacture of power, a process completely accomplished and resulting in a completed production within the taxing state—as distinguished from the use of an instrumentality in carrying on interstate commerce. The tax in question was laid on the privilege of operating 12 gas engines classified as "prime movers", which created mechanical power. The mechanical power after being created by the gas engines was transmitted to compressors which in turn made use of or consumed the power, as a subsequent process, in increasing the pressure in pipe lines used for the transportation of natural gas in interstate transportation. The opinion declared:

> "We regard the tax as one upon the privilege of producing the power."

In describing the distinction between the manufacture of power and the use or consumption of power, it was said in the opinion:

> "While the engine and compressor units are assembled on a common bed plate, their functions are thus seen to be as completely separate as if they were operated through belting. The engine is the 'prime mover' of the tax act, producing power to drive the compressor. While the use of the engine for the production of power synchronizes with the transmission of that power to the compressor, production occurs prior to transmission. It is just as much local as the generation of electrical power."

The manufacture of the power was separable from the subsequent use of that power in the interstate

transportation of gas. The gas company had the option of producing the power itself, subject to the tax, or of purchasing the power from some other producer (such as an electric power company) who would be assessed the same tax. The case at bar does not involve any manufacturing process. The acts of receiving, storing, handling to places of ultimate use and placement in ultimate use, are all acts of use or consumption in the performance of transportation. The tax considered in the *Coverdale* case was not laid upon the privilege of *using* the power, after it was produced, in carrying on interstate transportation. Had the tax been imposed directly upon such use, it clearly would have been a direct burden on interstate commerce and unconstitutional.

In the final opinion in the case at bar, it is argued that "it is true that the standby material here stored for the necessary maintenance of a great interstate railway is dedicated to an interstate use, but so are the pumps in the *Coverdale* case", and that "railways could not run unless their spare parts and maintenance supplies were used in the storage from which they were currently drawn, but neither could the gas be driven in interstate commerce unless the owner used the pumps". But that reasoning states no analogy. The use of the pumps was not being taxed—the *use* of no instrumentality of interstate commerce was being taxed in that case.

It was said in the opinion in the *Coverdale* case that a narrow distinction of facts exists between the tax held invalid in the *Helson* case and the tax considered

valid in the *Nashville* case. That narrow distinction of facts is the distinction which exists between the taxation of an event separable and completed before use in interstate commerce begins and the taxation of an event which is an inseparable part and act of carrying on interstate commerce.

The opinion in the *Coverdale* case classes the *Western Livestock* case with those involving privilege taxes for "carrying on a local business". The privilege taxed in the latter case was the carrying on of a local business of providing and selling advertising space in a publication which was sold to and paid for by subscribers, some of whom received it in interstate commerce. The opinion declared that the business of preparing, printing and publishing magazine advertising is peculiarly local and distinct from the subsequent circulation thereof whether or not that circulation be interstate commerce.

IV.

THE UNCONSTITUTIONALITY OF STATE EXCISE TAXATION BURDENING INTERSTATE COMMERCE IS NOT AVOIDED BY IMPOSING STATE TAXES AT AN EQUAL RATE ON INTRASTATE COMMERCE OR OTHER INTRASTATE PRIVILEGES.

In the case of *Adams Mfg. Co. v. Storen*, 304 U. S. 307, decided at the last term of this Court, it was ruled that the fact that a state tax is non-discriminatory and general in is operation does not save it from being declared invalid if it directly burdens interstate com-

merce. Such was in effect a restatement of the ruling in the following cases:

Crew Levick Co. v. Pennsylvania, 245 U. S. 292;

A. G. Spalding & Bros. v. Edwards, 262 U. S. 66, 69;

Cooney v. Mountain States Tel. Co., 294 U. S. 384, 393;

Philadelphia, etc. Co. v. Pennsylvania, 82 U. S. 232.

In *Bingaman v. Golden Eagle Lines*, the tax in question applied upon either the sale or use of gasoline and equally to local or interstate transportation uses. The tax was held to be a direct burden on interstate transportation and void notwithstanding the equality in the rate and application of the tax. That is the latest decision by this Court on the question of a direct tax upon the privilege of using a material to carry on interstate transportation.

If State excise taxation burdening interstate commerce is to be held constitutional on the theory that an excise tax at an equal rate is imposed on intrastate commerce, then by the same reasoning, the municipalities and other subdivisions of the State could exercise a like taxing power. The result would be that every county, city, town and village in the United States having the power to tax could and undoubtedly would impose excise taxes upon the privilege of using railroad property or maintaining a station or a ticket office or some other action essential to the carrying on of railroad transportation within its boundaries. The

interstate commerce passing over a line of railroad within a given municipal taxing unit might amount to a hundred times the intrastate business subject to taxation within the same area. As distance from seaboard or origin of shipment increases, the intervening states and municipalities could multiply the burden upon interstate commerce by taxing the privileges of engaging in that commerce. The result would be the total destruction of interstate transportation. This was pointed out in the opinion in the *Helson case*, 279 U. S. 245 at 251, quoting from the opinion of Mr. Justice Strong in *Minot v. Philadelphia W. & B. R. Co.*, 2 Abb. (U. S.) 323, 343, Fed. Case No. 9645, wherein it was said:

> "It is of national importance that in regard to such subjects there should be but one regulating power, for if one state can directly tax persons and property passing through it, or indirectly, *by taxing the use of means of transportation*, every other may; thus commercial intercourse between states remote from each other may be destroyed."

V.

THIS TAX IS DIRECTLY IMPOSED UPON THE PRIVILEGE OF ENGAGING IN INTERSTATE COMMERCE AND THEREFORE IS AN UNDUE AND UNCONSTITUTIONAL BURDEN ON SUCH COMMERCE.

From the foregoing statement of facts, including quotations from the Act in question, it is clear that the tax is imposed directly upon the privilege of using property in the operation of an interstate

transportation business.[7] "It is settled that a State may not directly burden interstate commerce, either by taxation or otherwise. But a tax that only indirectly affects the profits or returns from such commerce is not within the rule." (*U. S. Glue Co. v. Oak Creek*, 247 U. S. 321.) "A tax which falls directly upon the use of one of the means by which commerce is carried on directly burdens that commerce." (*Helson and Randolph v. Kentucky*, 279 U. S. 245, 252.)

In applying the general rule that it is not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of the state tax burden, even though it increases the cost of doing business, this Court has consistently observed definite boundaries beyond which state taxation is not permitted. It has never permitted direct taxation by any state of the privilege of engaging in interstate commerce.

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7. In its first opinion the trial Court, in connection with its holding that the property in question was at all times from and after its purchase in transportation service and use, said:

"The storage of such property is a use which is as integral a part of the interstate commerce project as are the rails over which interstate trains are actually running. It is the definite predetermined character of its purpose that makes the storage of these purchased articles of equipment as vital to the entire plant before installation as well as afterwards." (R. 57.)

In its final opinion the Court said:

"The railway has established that the storage use of the railway materials, solely for its current repairs and renewals and necessary extensions of its intermingled interstate and intrastate enterprise and plant, and without which usage the railways would stop running, is a use in interstate commerce. * * * At the hearing we invited further argument and briefing, but the able presentation on behalf of the State has not answered the question, 'In what enterprise other than the intermingled interstate and intrastate railroading is this use in storage for current repairs and replacements, without which the railroad could not operate?' Such storage use for current installation is use in interstate commerce in any realistic sense understood by industrialists and merchants. * * *." (R. 94.)

Western Livestock v. Bureau, 303 U. S. 250, cited by the lower Court in support of the reversal of its earlier opinion in this case, cites many cases and illustrations exemplifying the rule that "even interstate business must pay its own way", but not a single one of such cases or illustrations deals with a tax upon action sanctioned and protected by the commerce clause where the manner of imposition of the tax has been direct. They do not modify or criticize the long established rule that where the tax is directly imposed on an interstate privilege the burden is *ipso facto* direct and therefore unconstitutional.

The first class of cases cited refers to ad valorem property taxes on the instrumentalities employed in commerce, either determined by the fixed location of the property within the taxing state or by a proportion of movable transportation instrumentalities used within and without the taxing state where the fair apportionment is representative of the property within the taxing state during the taxable year or at the date of the incidence of the tax. With that class of cases may also be considered the kind of tax which is in lieu of property taxation, where the thing intended to be taxed is property, and earnings are adopted merely as a measure of value. The decisions in those cases were based on findings that the tax was not upon the privilege of engaging in interstate commerce and only remotely affected operations in interstate commerce. The distinction between the ad valorem taxation of property, although used as an instrumentality of interstate transportation, and a

tax directly imposed upon the privilege of engaging in such commerce or using the instrumentalities thereof has long been recognized in the decisions of this Court and the reasons therefor many times expounded as shown by the cases cited in the opinion in the *Western Livestock* case. In *Cleveland, C. C. & St. L. R. Co. v. Backus,* 154 U. S. 439, this Court said:

> "It has been again and again said by this court that while no state could impose any tax or burden upon the privilege of doing the business of interstate commerce, yet it had the unquestioned right to place a property tax on the instrumentalities engaged in such commerce."
>
> *McCulloch v. Maryland,* 4 Wheat. 316, 4 L. Ed. 579;
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> *Leloup v. Port of Mobile,* 127 U. S. 640;
>
> *Adams Express Co. v. Ohio,* 166 U. S. 185, 218.

Apart from the distinction between a direct and a remote burden on interstate commerce, there is a further reason for the approval of non-discriminatory ad valorem taxation of property used in carrying on interstate commerce within the State, and at the same time denying the power of the State to impose a tax directly upon the privilege of engaging in interstate commerce. That reason lies in the difference between the origin of the right of property ownership and the right of engaging in interstate commerce. This Court has approved the principle that a state cannot tax a privilege which it is without power to grant, control or withhold, and which, on the other

hand, is exclusively within the power of the federal government to grant, control or withhold.

In *McCulloch v. Maryland*, 4 Wheat. 316, at 429, it was said:

> "All subjects over which the sovereign power of a state extends, are objects of taxation: but those over which it does not extend, are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident.
>
> "The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution—powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single state. They are given by the people of the United States, to a government whose laws, made in pursuance of the constitution, are declared to be supreme. Consequently, the people of a single state cannot confer a sovereignty which will extend over them.
>
> "If we measure the power of taxation residing in a state, by the extent of sovereignty which the people of a single state possess, and can confer on its government, we have an intelligible standard, applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a state unimpaired; which leaves to a state the command of all its resources, and which places beyond its reach, all those powers

which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the states, and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve."

Similarily in *James v. Dravo Contracting Company*, 302 U. S. 134, the Court said:

"But the difference is plain. Persons have a constitutional right to engage in interstate commerce free from burdens imposed by a state tax upon the business which constitutes such commerce or the privilege of engaging in it or the receipts as such derived from it. Minnesota Rate Cases (Simpson v. Shepard), 230 U. S. 352, 400, 57 L. Ed. 1511, 1542, 33 S. Ct. 729, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18. Interstate commerce is not an abstraction; it connotes the transactions of those engaged in it and they enjoy the described immunity in their own right."

California v. Central Pacific R. Co., 127 U. S. 1; *Anglo-Chilean Nitrate Sales Corp. v. Alabama*, 288 U. S. 218.

The right of property ownership existed before the federal constitution was adopted, and no delegation of power to the federal government to regulate that

right is in the Constitution. The right to engage in interstate commerce does not depend in any degree upon sanction of any of the states.

In ad valorem property taxation, there does not exist the risk of discrimination or multiplied or extra-territorial taxation which is possible in privilege taxation. As this Court, speaking through Mr. Justice Holmes, said in *Galveston, Harrisburg &c. Ry. Co. v. Texas*, 210 U. S. 217, 227:

> "The State must be allowed to tax the property and to tax it at its actual value as a going concern. On the other hand the State cannot tax the interstate business. The two necessities hardly admit of an absolute logical reconciliation. Yet the distinction is not without sense. When a legislature is trying simply to value property, it is less likely to attempt to or effect injurious regulation than when it is aiming directly at the receipts from interstate commerce."

Upholding ad valorem property taxation of property used in carrying on interstate transportation, while denying the right of a state to impose excise taxation upon the privilege of engaging in interstate transportation or using the instrumentalities thereof, is analogous in one respect to the difference which has been recognized by this Court between state taxation of net income derived from transactions in interstate commerce, which has been upheld, and the taxation of gross income derived from interstate commerce which has been condemned.[8] The taxation of net income,

---

8. *U. S. Glue Co. v. Oak Creek*, 247 U. S. 321.
Franchise, license, occupation, or other excise taxes measured by the gross receipts of companies engaged in interstate commerce are invalid: *New*

ike ad valorem property taxation, has a definite tie to value. A tax based on net income is a percentage of a realized value.

In ad valorem property taxation the value used as the taxing base is like net income because value of property in any commercial sense is its *net earning value*, present and prospective. Property is not valued by its *gross rental*. Property value does not depend upon the earnings of a defined period; it may have a prospective or speculative value. While use of business property might not immediately be profitable in the hands of one owner, it has intrinsically a use value in the hands of some user, if it has any value at all. If it had no net earning capacity whatever, present or prospective, in the hands of anyone, or for any use, it would have no value to be taxed and no one would claim the ownership of such property or pay taxes on it.[9]

While net income taxation, like ad valorem property taxation, has a tie to net value, privilege taxation when not measured by a net return of the privilege taxed does not have a fixed relation to net value or to a realized profit. A franchise or privilege is taxed only for the period of the exercise of the privilege taxed; the right taxed having been completely exer-

Jersey Telephone Co. v. Tax Board, 280 U. S. 338, 349; *East Ohio Gas Co. v. Tax Commission*, 283 U. S. 465; *Matson Navigation Co. v. Tax Board*, 297 U. S. 441, 444; *Fisher's Blend Station v. Tax Commission*, 297 U. S. 650, 655-656; *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U. S. 90, 94; unless based solely upon gross receipts from local business, *Pacific Telephone Co. v. Tax Commission*, 297 U. S. 403, 415, 416.

9. *Cleveland, etc. Ry. Co. v. Backus*, 154 U. S. 439, 445;
Boom Company v. Patterson, 98 U. S. 403;
Somers v. City of Meriden, 119 Conn. 5, 95 A. L. R. 434, note 442, 445;
Schmidt v. Saline County, 122 Neb. 56;
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cised or the taxable period having expired, nothing remains to have a prospective value. But that is not true of capital property. In the taxation of storage, use or other consumption of property, the privilege might be entirely exercised without producing any profit. A railroad might pay its use taxes for the use of materials and supplies or other instrumentalities of commerce which are entirely consumed during a fiscal year when its operations are conducted at a loss. Nothing would remain of such consumed properties or as a residue of such privilege out of which loss could be recouped by prospective operations, although its capital plant might remain with its prospective earning capacity or salvage value.

It can be said of the tax in question in the case at bar, amounting to more than $300,000, and continuing to accrue in large amounts, as was said by this Court in *United States Glue Company v. Oak Creek*, 247 U. S. 321, that "conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce". Contrasting a tax upon gross receipts, the Court continued (p. 329):

> "A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, * * * Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, *like a tax upon property, or upon franchises treated as property.*" (Emphasis supplied.)

Thus we see there is a real distinction between taxation which has a tie to value, or to net income as representing a realized value, and that which is without such limitation.

In *Western Livestock v. Bureau*, supra (p. 260), the Court assigned as an added reason why the tax there in question, sustained as being laid upon a local privilege, was not subject to the objection which has been leveled at taxes laid upon gross receipts derived from interstate commerce, that the tax is not one which in form or substance can be repeated by other states. The Court did not say and surely did not intend to imply that because a tax may not be imposed by more than one state, that fact alone, excluding all other objections, would justify any state in levying a tax directly upon a privilege of conducting interstate transportation. The bare fact that the action taxed was performed wholly within one state would not obviate the constitutional objections which are pointed out herein, for example, that the tax was directly imposed upon an interstate privilege, was extraterritorial in its operation and effect or was otherwise discriminatory. Gross income from interstate commerce might be earned by a railroad operating wholly within one state, but that state could not tax such gross income as the price of the privilege of carrying on interstate commerce.

Other cases cited in *Western Livestock v. Bureau*, as illustrative of the limits upon a state's taxing powers, relate to the taxation of local or intrastate

privileges, within the state's power to grant, regulate or withhold, and none of them have reference to the direct taxation of the privilege of engaging in interstate commerce.

Helvering v. Producers Corp., 303 U. S. 376, is cited in the trial Court's final opinion in the case at bar as one of the cases, dealing with the boundaries of state and federal taxation, which prompted it to reconsider its earlier opinion. That case upheld a federal income tax upon the proceeds of the production of oil and gas from lands leased from the state, on the ground that the effect of the tax on the state function of leasing the lands was only indirect and remote. We submit that the case is not in point.

The rule of non-discrimination against goods having an out of state origin is applicable only to cases where the tax is imposed upon a local privilege and the tax burden on interstate commerce is indirect. As this Court has frequently said (supra page 28), the generality of the application of the tax, its compensatory features or lack of discrimination do not save the tax if it is directly imposed. The taxes which this Court has upheld as not discriminatory against goods having an out of state origin (as in *Henneford v. Silas Mason Co.*, 300 U. S. 577; *Gregg Dyeing Company v. Query*, 286 U. S. 472; *Sonneborn v. Cureton*, 262 U. S. 506, and *Hinson v. Lott*, 8 Wall. 148[10]) have

10. In *Hinson v. Lott*, supra, the tax was not upon interstate commerce but was on the purely local privilege of sale of liquors. That tax on local sales was complementary to a tax which applied to local manufacture at the same rate per gallon. By previous sections of the same Act, a tax of 50c

been characterized by several important features: Preliminarily, it should be noted that no tax upon an interstate use was involved in those cases, as there is in the case at bar. In the next place, in those cases the sales and use taxes, taken together, were both consumers' taxes imposed upon the same class of persons and the same class of privileges.[11] In the case at bar, however, the California use tax, alleged to be complementary to the California sales tax, is a consumer's tax (and as here applied is a tax upon the privilege of carrying on interstate commerce) while the sales tax is imposed upon the local privilege of

---

per gallon was imposed on all whiskey and all brandy from fruits manufactured in the State and the sales tax was of the same amount.

The taxing statute in question provided:

> "Before it shall be lawful for any dealer or dealers in spirituous liquors to offer any such liquors for sale within the limits of this State, such dealer or dealers introducing any such liquor into the State shall first pay the tax collector of the county into which such liquors are introduced, a tax of 50¢ per gallon upon each and every gallon thereof."

In the opinion it was said:

> "And it is clear that whereas collecting the tax of the distiller was supposed to be the most expedient mode of securing its payment, as to liquors manufactured within the State, the tax on those who sold liquors brought in from other states was only the complementary provision necessary to make the tax equal on all liquors sold in the State."

11. The tax considered by this Court in the case of *Henneford v. Silas Mason Co.*, the so-called compensating tax was a use or consumers' tax. Likewise, the Washington sales tax (Revenue Act of 1935, p. 180, Session Laws 1935) was a consumers' tax—specifically not a tax upon the privilege of carrying on the business of retailing—so that all consumers, whether purchasing locally or in interstate or foreign commerce paid the same consumers' tax. See the case of *Morrow v. Henneford*, 47 P. (2d) 1016.

In the *Gregg Dyeing Company* case, this Court accepted the State's interpretation of its taxing policy and considered the statutes held to be *in pari materia* as each being statutes imposing in effect a consumers' tax. In the Court's opinion it is pointed out that by the kindred acts "all uses are taxed." Although the tax is referred to as a tax on the dealers from whom the consumers buy, in the same sentence it is declared that the consumers pay the tax and, repeatedly, throughout the decision, the Court has referred to the equal burden of tax resting upon the consumer and clearly refers to the tax collected through the dealers as one resting upon the privilege of use or storage for use. The opinion shows that the Court was considering only the question of difference in tax burden between classes of consumers based on the State's theory that the tax was upon use or storage for use, although collected through the agency of the retailer. No suggestion appears to have been made that different kinds of privileges were taxed.

carrying on the business of retailing—not a transactions tax nor a tax upon the purchaser or consumer. In other words, the tax as imposed under the respective acts apply to different classes of persons and to entirely different privileges. In the third place, while the California Retail Sales Tax Act indicates the source from which the retailer is authorized to reimburse himself for the amount of the sales tax, there is nothing in the law which imposes the tax upon the consumer or compels the retailer to exact the tax from his customer. He may bury the tax in his selling price or waive its collection.[12]

While the purpose to protect local merchants or manufacturers by compensating taxes applying exclusively to local privileges, such as was approved in *Henneford v. Silas Mason Co.,* might find some justification, such purpose does not aid the constitutionality of the effort to place a direct burden upon the privilege of using instrumentalities in carrying on interstate transportation. The attempt to impose such a compensating tax assumes the possibility of measuring a differential in tax burden between the California retailer and the out-of-state retailers of many states selling goods to California consumers. To know the comparative tax burdens falling upon local privileges in a single jurisdiction is possible, but to know the comparative tax burden of the intrastate

12. Chap. 1020, Cal. Stats. 1933; Chaps. 351, 355, 357 Stats. 1935; Chaps. 400 and 778 Stats. 1937;
Meyer Construction Co. v. Corbett (three judge U. S. D. C.), 7 Fed. Supp. 616;
National Ice and Cold Storage Co. v. Pacific Fruit Express Co. (1938), 95 Cal. Dec. 442, 455; ..... Cal. Rep. .....

compared to the interstate retailers of different states, it would be necessary to know the whole measure of the tax burden resting respectively upon each of them. Each state has its own separate taxing policy and there is no uniformity in taxing laws among the several states. While the California merchant pays a sales tax, the competing merchant in another state may be under higher property taxation, some other form of or higher license taxes, higher income taxes, some special manufacturer's tax, etc. If every state in the Union were at liberty to equalize some particular tax disadvantage of its manufacturer or tradesman by placing upon imports into such state, some kind of a compensating tax as a restraint upon interstate competition, at the same time maintaining a favorable tax imposition upon its home industries in all other respects, the freedom of interstate commerce would be at an end. Whatever the state may do as to its plan of local taxation, in setting up a tax system which involves the privilege of conducting interstate transportation, it certainly has no right to speculate as to the comparative tax burden resting upon local retailers and those engaged in interstate commerce in supplying transportation companies with the instrumentalities for carrying on interstate transportation.

In another respect, such direct taxation of the privilege of conducting interstate transportation as is attempted in the case at bar, holds possibilities of discrimination against interstate commerce. A large number of articles are already exempt from the California sales tax and use tax. For example, under the

Sales Tax Act as amended, gas, electricity, water, certain gold products, certain motor vehicle fuel, food products, sales of certain vessels constructed in California, sales by the producer of products of the soil and all sales which are not made in due course of the business of retailing, are not taxable. The existence of these exemptions with respect to goods purchased within the state is an obvious discrimination against those who, like the appellant, find it necessary to purchase large amounts of property outside the state.[13]

The Use Tax Act is discriminatory in the respect that it fails to provide any exemption for sales or other excise taxes which may be imposed upon the same property by other states before its sale in interstate commerce to purchasers in California. (R. 9-13.) An exemption of that character was provided in the tax law considered by this Court in the case of *Henneford v. Silas Mason Co.*, 300 U. S. 577.

Furthermore, to the extent that railway operating supplies and equipment purchased in interstate commerce are not available for purchase within the state and therefore not competitive with goods sold by local retailers, the use tax would not be a true compensating tax even though uniformly imposed on uses instead of on different privileges. Since this Court decided the case of *Henneford v. Silas Mason Co.*, supra, holding the Washington compensating tax valid in

13. The allegations of the bill of complaint to the effect that the greater proportions of the items purchased by appellant during the second quarter period (1936), and thereafter to be purchased, are not manufactured or produced in California and were not and are not competitive with California industries, were admitted by the answer. (R. 21, 65.) The appellant's purchases in interstate commerce since March 31, 1936, amounts to some ten million dollars.

application to local uses, the Supreme Court of the State of Washington in the case of *The Pacific Telephone & Telegraph Co. v. Henneford* (July 1938), ... Wash. ....., 81 Pac. (2d) 786, has decided that the said tax is not a true compensating tax because the property involved in that case was not competitive with goods sold by local retailers within the State of Washington.

In the case at bar it is admitted that the object and intent of the California Use Tax Act was to protect California industry from outside competition. Even in the absence of such an admission, this Court has declared in the *Silas Mason* case as to a similar use tax act, that the purpose of such legislation is to protect local dealers against interstate competition. It is also admitted that the majority of the property purchased by plaintiff and sought to be subjected to the tax was property which was not and is not manufactured or produced in California, and therefore not competitive with California industry. Particular items of said property are track materials, car and locomotive parts, manufactured steel tires, timber, sheet steel, steel tires, car heating parts, pile driver parts, locomotive journal grease, steel tubing and numerous other items not manufactured or produced in California. (R. 21, 65.) Therefore, the tax in question, as to such non-competitive materials, is not truly compensating, but is wholly discriminatory as to all property not manufactured or produced within the State. Such discriminations constitute a direct and undue burden.

VI.

THE TAX IS EXTRATERRITORIAL IN ITS OPERATION AND EFFECT AND IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FEDERAL CONSTITUTION.

The Use Tax Act imposes a flat-rate tax without apportionment for property inseparably used by a railroad interstate carrier in the transaction of its transportation business both within and without the State of California.

The foregoing statement of facts shows that appellant's general stores and purchasing department are located in California and that purchases of railroad materials and supplies are made and shipped to a single California destination and thence distributed through its unified distribution system over its lines in the several states. In the normal conduct of the railroad business, materials and supplies must be issued from terminal points for maintenance of plant and equipment and operation of trains. Supply cars and work trains take on their supplies at California terminals.

Train supplies which are issued at California terminals for the servicing of the train on line and for power for locomotives, repair parts, etc., for trains in interstate runs, would be partly consumed within the state, but their ultimate or completed physical use or consumption would not occur until such materials or an indeterminable part thereof have been moved out of the state in course of the movement of trains.

A large and substantial part of the materials and supplies and other articles of tangible personal prop-

erty are used in connection with overhead operations carried on and performed within California because of the fact that general repair and maintenance shops and yards for the entire system are located within the state and are operated for the use of said entire railway system. A repair part might be applied to a freight car at a California shop and the car immediately be moved out of the state in course of normal railroad operation and remain in out of state service for many months.

In a further respect, the tax would affect out of state operations and that is in connection with materials and supplies, etc., used for general offices located within California. Materials, supplies, etc., used in connection with the general system management located in California, are an expense to transportation in whatever state the actual transportation occurs because such overhead extends to the entire system and a tax expense imposed directly upon general management is a tax expense and tax burden apportionable to conducting transportation wherever the same is performed. (*Norfolk etc. Railroad Co. v. Penn*, 136 U. S. 114, 120.)

An unapportioned tax upon the privilege of storage, use or consumption of property in such overhead operations of an interstate railroad would be a tax upon railroad operations extending over state lines or a tax upon ultimate uses in other states.

When the full measure of the use tax is imposed upon an inseparable part of use, a small part of which use might occur within California, the remaining use

occurring in other states, such imposition makes a direct tax and burden on the operations of interstate commerce in other states.

It is settled that a state cannot, in the guise of excise taxation, impose charges which result in taxing things, actions or privileges wholly beyond her jurisdiction and control. Such a tax is in conflict with the due process clause of the Fourteenth Amendment to the Constitution of the United States.

James v. Dravo Contracting Company, 302 U. S. 134;

Connecticut Gen'l Life Ins. Co. v. Johnson, 303 U. S. 77;

Frick v. Pennsylvania, 268 U. S. 473;

Great Atlantic & Pacific Tea Company v. Grosjean, 301 U. S. 412;

International Paper Co. v. Massachusetts, 246 U. S. 135.

We respectfully submit that the decree should be reversed, with instructions to the trial Court to grant the relief sought by appellant.

Dated, San Francisco, California,
November 10, 1938.

GUY V. SHOUP,
HARRY H. MCELROY,
Counsel for Appellant

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SUPREME COURT OF THE UNITED STATES

October Term, 1938

No. 212

SOUTHERN PACIFIC COMPANY (a corporation),

Appellant,

vs.

JOHN C. CORBETT, FRED E. STEWART, RICHARD E. COLLINS, WILLIAM G. BONELLI and HARRY B. RILEY, as members of the State Board of Equalization of the State of California, STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, and U. S. WEBB, the Attorney General of the State of California,

Appellees.

BRIEF OF APPELLEES

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Appellees.

BRIEF OF APPELLEES

STATEMENT OF FACTS

We have carefully read appellant's "Statement of the Case" and "Summary of Facts" and, except for the matters mentioned below, find no substantial objection thereto.

Throughout the statement and summary, appellant speaks of the tax as imposed on or with respect to the use of property in the operation of its intermingled intrastate, interstate and foreign railroad transportation business. It should be observed, however, that the tax is imposed not merely upon the use of property but also upon the *storage* of property (Use Tax Act, section 3), and that it is our contention that tax liability may be based upon the keeping or retention of the property prior to its actual use in the operation of appellant's railroad.

In view of the facts of this case as herein stipulated (R-71) we are justified in stating:

(a) After the completion of the interstate transportation of the property here in question the same becomes a part of the mass of property in the state and is either stored, installed or used in appellant's commingled interstate and intrastate commerce (R-71, particularly pars. 3, 22, 24, 26, 27, 28, 31, 32, 33, 36 and 37).

(b) Wherever storage occurs the same is subsequently followed by withdrawal from storage for the purpose of installation or use (Pars. 31, 32, 33).

(c) Installation may occur without intervening storage in warehouses or company stores, but prior to such installation there has been a holding or retention of the property by appellant, following

the termination of the interstate shipment thereof (Pars. 28, 36, 37).

(d) Installation of materials and supplies takes place in the ordinary course of the transportation business (Pars. 27, 35).

(e) After installation the property is used in the inextricably commingled interstate and intrastate business of appellant (Par. 2).

Appellant asserts that it "purchases the tangible personal property in question for the sole, fixed and predetermined purpose of use in conducting its said transportation business and will continue to purchase like property for such purpose, and so use the same (R. 106, 118, 119)." It should be noted in this connection, however, that certain property purchased by appellant is transferred to and used by foreign railroads in connection with the repair of foreign cars, transferred to and used by subsidiary railroad companies of appellant, and sold to other railroad companies (R 120, 126).

The "Specification of Errors" sets forth sixteen alleged errors of the lower court. Of these sixteen alleged errors Nos. 3 to 14, both inclusive, relate to the failure or refusal of the lower court to make conclusions of law requested by appellant. In substance, the conclusions of law requested by appellant present appellant's theory of the law of the case and inasmuch as appellant's theory of the law of the case was not adopted by the lower court it naturally follows that appellant's requested conclusions of law were rejected by the trial court.

Instead of discussing the alleged errors *seriatim* we will direct our argument at the proper time to the six points discussed by appellant in its brief.

NATURE OF CALIFORNIA USE TAX

A. California Use Tax Is Complementary to the California Retail Sales Tax Act

The California Use Tax Act of 1935 (Stats. 1935, p. 1297) became effective June 25, 1935, and by section 3 thereof imposed an *excise* tax on the storage, use or other consumption in the state of tangible personal property purchased for storage, use or other consumption in the state. The rate of tax is 3 per cent of the purchase price.

The California Use Tax Act is complementary to the California Retail Sales Tax Act (Stats. 1933, p. 2599), in practically the same way that the Washington Compensating Tax Statute is complementary to the Washington Sales Tax Statute. The Washington Compensating Tax Statute was before this court in *Henneford* vs. *Silas Mason Company,* 300 U. S. 577.

There are differences between the Washington statute and the California Use Tax Act but those differences are not believed to be material here.

In the *Silas Mason* case this court upheld the validity of the Washington Compensating Tax as applied to property purchased outside the state and devoted to intrastate uses within the state. This case is discussed later on in this brief.

The California Retail Sales Tax Act imposes upon retailers of tangible personal property within the state an excise tax of 3 per cent of the gross receipts from the sale of such property. As a matter of common practice the retailers "pass on" the tax to the purchasers.

The Sales Tax Act, as amended in 1935, is incorporated herein as Exhibit A.

The Use Tax Act of 1935 is incorporated herein as Exhibit B.

B. California Use Tax Act As Written and As Administered Imposes a Tax Only on Intrastate Storage, Use or Other Consumption of Property Within the State and Does Not Impose Any Burden Upon Interstate Commerce

When the following sections of the California Use Tax Act are read together it becomes obvious that the act, as written, does not purport to levy a tax burden upon interstate commerce.

Section 3 of the act provides in part as follows:

> "An excise tax is hereby imposed on the storage, use or other consumption in this State of tangible personal property purchased from a retailer on or after July 1, 1935, for storage, use or other consumption in this State at the rate of three per cent of the sales price of such property."

Section 2 provides in part as follows:

> "The following words, terms, and phrases when used in this act have the meanings

ascribed to them in this section, except where the context clearly indicates a different meaning.

(a) 'Storage' means and includes any keeping or retention in this State for any purpose except sale in the regular course of business or subsequent use solely outside this State of tangible personal property purchased from a retailer.

(b) 'Use' means and includes the exercise of any right or power over tangible personal property incident to the ownership of that property, except that it shall not include the sale of that property in the regular course of business."

Section 4 of the act provides in part as follows:

"The storage, use or other consumption in this State of the following tangible personal property is hereby specifically exempted from the tax imposed by this act:

(a) Property, the gross receipts from the sale of which are required to be included in the measure of the tax imposed by Chapter 1020, Statutes of 1933, and any amendments made or which may be made thereto.

(b) Property, the storage, use or other consumption of which this State is prohibited from taxing under the Constitution or laws of the United States of America or under the Constitution of this State."

When Ruling No. 11, adopted by the State Board of Equalization of the State of California pur-

suant to the provisions of the California Use Tax Act, is considered it becomes obvious that the act, as administered, does not purport to impose a tax burden upon *interstate* commerce.

Ruling No. 11 reads as follows:

> "The fact that tangible personal property is purchased in interstate or foreign commerce does not exempt from the tax the storage, use or other consumption of such property in this State after the shipment of the property in interstate or foreign commerce has ended.
>
> "The fact that tangible personal property is used in interstate or foreign commerce following its storage in this State does not exempt the storage of the property from the tax. Property is deemed to be stored in this State if held in this State for any period of time whatever following the delivery of the property to the purchaser or the termination of the interstate or foreign shipment of the property to the purchaser."

We sumbit that when the act is considered as a whole, together with the above mentioned Ruling No. 11, it becomes apparent that the act, as written and administered, levies a tax burden upon the privilege of using tangible personal property in *intrastate* commerce only.

ARGUMENT

I

"A State Excise Tax Imposed Directly Upon the Privilege of Using Instrumentalities in Carrying on and Conducting Interstate and Foreign Transportation and Commerce by a Railroad Common Carrier, Is a Direct Burden on Such Transportation and Commerce, Contrary to the Provisions of Article I Section 8, of the Constitution of the United States"

WITHDRAWAL FROM STORAGE AND INSTALLATION

Inasmuch as the tax in question is imposed in respect to the storage, as well as the use of tangible personal property in the State of California, and since under the Findings of Facts herein, all the property in question was held or retained by appellant for some period of time after the termination of its shipment to California, and before its actual installation and use in its railroad operation (R. 116-119) and the property was used in intrastate as well as in interstate and foreign commerce (R. 105), it seems unnecessary to argue the law applying to a case not before the court, that is a case where only interstate and foreign commerce is involved.

In other words, it seems out of place here to reopen the case of *Helson and Randolph* vs. *Kentucky,* 279 U. S. 245, or any of the other cases re-

ferred to by appellant under this heading, as they obviously can not be in point under the facts of this case.

Of the fifteen cases cited by appellant under this heading, nine were cases involving an attempt to tax companies engaged solely in interstate commerce, which is not the case here; four were cases involving statutes imposing a tax upon gross receipts of companies engaged in both interstate and intrastate commerce, the tax not being a property tax.

The other two cases are:

(a) *Midcontinent Air Express Corporation* vs. *Lujan* (1931), 47 Fed. (2d) 266, decided by a three-judge court for the District of New Mexico. The tax was upon the use of gasoline by the company in its interstate and intrastate business. The court said the latter was incidental to the former, but since the gasoline could not be apportioned between the two, the case was controlled by *Helson and Randolph* vs. *Kentucky, supra.* The New Mexico tax in question being imposed only upon the use of gasoline, this case, like the *Helson* and *Bingaman* cases, is not in point, as will hereafter be shown.

(b) The *Pacific Telephone and Telegraph Company* vs. *Henneford* (1938), ___ Wash. ___, 81 Pac. (2d) 786, wherein the Supreme Court of the State of Washington held that the compensating tax act of that state does not apply to goods not produced or sold in the state. A petition for writ of cer-

tiorari is pending in this court and at the time this brief is being written the petition has not been acted upon.

We submit that appellant's argument under this heading is wide of the issue before the court.

II

"A State Excise Tax Can Not Validly Be Applied Indiscriminately and Without Apportionment to an Instrumentality Common to Interstate and Intrastate Commerce"

We are not inclined to question this contention of appellant in so far as it is dependent for its support upon the sole authority cited therefor. *Cooney* vs. *Mountain States Telephone and Telegraph Company* (1935), 294 U. S. 384. Here again appellant advances a principle of law which, in our opinion, has no application to the present case.

In the *Cooney* case this court held that a state license tax upon persons or firms engaged in the business of operating or maintaining telephone lines and furnishing telephone service in the state measured by the number of telephone instruments used in the conduct of that business could not constitutionally be applied to a company conducting a combined interstate and intrastate telephone business in the state. If the State of California were asserting herein a license tax upon those engaged in the business of operating a railroad measured by the amount of equipment used in the

operation thereof, then the *Cooney* case might well be asserted as authority for the contention that the tax was invalid as applied to the appellant which is, of course, engaged in intrastate and interstate commerce. The California use tax, however, bears no resemblance whatever to such a tax. It is not imposed for the privilege of engaging in any business whether of an interstate character or otherwise and it is not imposed upon the actual use of the property in the conduct of appellant's interstate business. On the contrary, the use tax as applied to appellant is imposed *inter alia* on the storage of property in the state, its withdrawal from storage or its installation, all of which events occur prior to its use in the conduct of appellant's business and which were held to be proper subjects for state taxation in *Nashville, Chattanooga and St. Louis Railway Company* vs. *Wallace* (1933), 288 U. S. 249, and *Edelman* vs. *Boeing Air Transport, Inc.* (1933), 289 U. S. 249, discussed hereafter, notwithstanding the subsequent use of the property in interstate commerce.

III

"The Case at Bar Is Distinguished by Its Facts from the Cases in Which the Privileges Taxed Were Not Acts of Conducting Interstate Transportation"

Appellant's attempt here to distinguish the principal cases relied upon by appellees furnishes an opportunity for appellees to establish the relevancy

of those cases to the issue involved herein and, in turn, to distinguish the cases relied upon by appellant.

The property which was subjected to the use tax was stored and subsequently used by appellant in the State of California in its inextricably commingled interstate, intrastate and foreign transportation business. The state contends the tax was valid, while appellant contends it was invalid and thus the essential issue is raised.

The cases which we consider to be most pertinent to the issue involved here are the following:

(a) *Eastern Air Transport* vs. *South Carolina*, 285 U. S. 147;

(b) *Gregg Dyeing Company* vs. *Query*, 286 U. S. 472;

(c) *Nashville, etc. Ry. Co.* vs. *Wallace*, 288 U. S. 249;

(d) *Edelman* vs. *Boeing Air Transport*, 289 U. S. 249;

(e) *Pacific Tel. & Tel. Co.* vs. *Tax Commission*, 297 U. S. 403;

(f) *Henneford* vs. *Silas Mason Co.* (1937), 300 U. S. 577;

(g) *Southern Natural Gas Corporation* vs. *Alabama* (1937), 301 U. S. 148;

(h) *Western Live Stock* vs. *Bureau of Revenue* (1938), 303 U. S. 250;

(i) *Coverdale* vs. *Arkansas-Louisiana Pipe Line Company* (1938), 303 U. S. 604.

See also

(a) *American Airways, Inc.* vs. *Wallace* (1932), 57 Fed. (2d) 877, affirmed 287 U. S. 565;

(b) *American Airways, Inc.* vs. *Grosjean* (1933), 3 Fed. Supp. 995, affirmed 290 U. S. 596;

(c) *Central Vermont Railway Co., Inc.* vs. *Campbell* (1937), ---- Vt. ----, 192 Atl. 197, 111 A. L. R. 175;

(d) *Commonwealth* vs. *Dixie Greyhound Lines, Inc.* (1934), 255 Ky. 111, 72 S. W. (2d) 1032.

The case which seems to be most nearly in point here is *Nashville etc. Ry. Co.* vs. *Wallace, supra.* That case, with others subsequently decided to the same effect, seems to us to be controlling. We can discover no principle involved in the case at bar which was not there considered and disposed of by this court adversely to appellant's contentions here.

The *Nashville* case was an appeal from the Supreme Court of Tennessee, which had decided it in favor of the state's taxing power under the particular state law in question. This court affirmed the decision of the state court.

The facts, briefly stated, were that the railroad company brought gasoline into Tennessee, stored it in tanks and withdrew it as required for use as a source of motive power for moving its *interstate* trains in that state and in other states.

The state statute in question imposed a privilege tax upon all persons *storing* gasoline in Tennessee and thereafter withdrawing it from storage, whether for sale or for other use.

The railway company assailed the tax on two grounds: (a) That it was imposed on the gasoline while still a subject of interstate commerce in the course of transportation from points of origin to points outside of the State of Tennessee, and (b) on the ground that the tax was in effect a tax upon the use of the gasoline in the company's business as an interstate carrier and therefore was an unconstitutional burden on interstate commerce.

We do not understand that the first contention above mentioned is presented here, but apparently appellant's principal reliance is upon the second contention.

This court in the *Nashville* case held:

(a) That the gasoline upon being unloaded and stored ceased to be a subject of transportation in interstate commerce and lost its immunity as such from state taxation (p. 266);

(b) The fact that the gasoline was, in the ordinary course of the company's business, later withdrawn from storage for use, some within and some without the state, part of it thus becoming again the subject of interstate transportation, did not affect the power of the state to tax it all before that transportation commenced (p. 266);

(c) The gasoline in storage was not a subject of interstate commerce and so was a part of the common mass of goods within the state, subject to local taxation (p. 266).

In the course of its opinion, the court stated:

"We can not say that the tax is a forbidden burden on interstate commerce because appellant uses the gasoline, subsequent to the incidence of the tax, as an instrument of interstate commerce. Taxes said to burden interstate commerce directly when levied upon or measured by the operation of interstate commerce or gross receipts derived from it, are beyond the state taxing power, *East Ohio Gas Co.* v. *Tax Commission*, 283 U. S. 465; 470; *Sprout* v. *South Bend*, 277 U. S. 163, 170, 171; *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292, 297, and a tax levied upon the use of gasoline in generating motive power for a ferry boat used exclusively in interstate commerce has been held to be so direct and immediate a burden on the commerce itself as to be invalid. *Helson* v. *Kentucky*, 279 U. S. 245.

"But interstate rail carriers are not wholly immune from other forms of non-discriminatory state taxation, even though the burden of the tax is thus indirectly or incidentally imposed upon the interstate commerce in which they are engaged. It can not be doubted that, when the gasoline came to rest in storage, the state was as free to tax it, notwithstanding its prospective use as an instrument of interstate commerce, as it was to tax appellant's right of way, rolling

stock or other instruments of interstate commerce, which are subject to local property taxes. *Cudany Packing Co.* v. *Minnesota,* 246 U. S. 450; *U. S. Express Co.* v. *Minnesota,* 223 U. S. 335; *Western Union Telegraph Co.* v. *Gottlieb,* 190 U. S. 412; *Adams Express Co.* v. *Ohio,* 165 U. S. 194, 220; see *General American Tank Car Corp.* v. *Day,* 270 U. S. 367; *Interstate Busses Corp.* v. *Blodgett,* 276 U. S. 245, compare *St. Louis-San Francisco Ry. Co.* v. *Middlekamp,* 256 U. S. 226, 231; *St. Louis, Southwestern Ry.* v. *Arkansas,* 235 U. S. 350; *Kansas City, F. S. & M. Ry. Co.* v. *Botkin,* 240 U. S. 227; *Kansas City, M. & B. R. Co.* v. *Stiles,* 242 U. S. 111; *Southern Ry. So.* v. *Watts,* 260 U. S. 519. The power to tax property, the sum of all the rights and powers incident to ownership, necessarily includes the power to tax its constituent elements. See *Bromley* v. *McCaughn,* 280 U. S. 124, 136-138. Hence, there can be no valid objection to the taxation of the exercise of any right or power incident to appellant's ownership of the gasoline, which falls short of a tax directly imposed on its use in interstate commerce, deemed forbidden in *Helson* v. *Kentucky, supra.* Here the tax is imposed on the successive exercise of two of those powers, the storage and withdrawal from storage of the gasoline. Both powers are completely exercised before the use of the gasoline in interstate commerce begins. The tax imposed upon their exercise is therefore not one imposed on the use of the gasoline as an instrument of commerce and the burden of it is too indirect and remote from the function of

interstate commerce itself to transgress constitutional limitations. See *Eastern Air Transport* v. *Tax Commission*, 285 U. S. 147." (288 U. S. at p. 267.)

In the *Nashville* case, as in the instant case, a tax was asserted to be due with respect to property which had been shipped into the taxing state in interstate commerce, stored in the state for some period of time awaiting use, withdrawn from storage for immediate use in the operation of an interstate railroad and actually used in interstate commerce in such operation. In each case liability for the tax was based upon the storage or withdrawal from storage of the property after the termination of the interstate shipment and before the actual use in interstate commerce.

The *Nashville* case, therefore, seems to compel the conclusion finally arrived at by the lower court in this case in its opinion of May 3, 1938, that the tax statute here in question was valid and that its application with respect to the property of appellant violated no constitutional right of appellant.

The *Nashville* case was decided in 1933 and was preceded by *Eastern Air Transport* vs. *South Carolina*, and *Gregg Dyeing Company* vs. *Query*, *supra*, both of which are in harmony with the *Nashville* case. Since the decision in the *Nashville* case this court has decided the cases mentioned in (d) to (i) above, all of which appear to confirm and re-

affirm the principles decided in the *Nashville* case.

In three of those cases, namely, *Edelman* vs. *Boeing Air Transport, Inc., supra; Henneford* vs. *Silas Mason Company, supra;* and *Coverdale* vs. *Arkansas-Louisiana Pipe Line Company, supra,* the *Nashville* case was cited with approval and the principles there stated were expressly reaffirmed.

The cases of *Helson* vs. *Kentucky,* 279 U. S. 245, and *Bingaman* vs. *Golden Eagle Western Lines,* 297 U. S. 626, relied upon by the appellant, may readily be distinguished from the instant case. In those cases, it was held that a state tax could not be imposed on the use within the state of gasoline in the operation of an interstate ferry and motor carrier, respectively. In each case, however, the tax was sought to be imposed upon the use of gasoline in the state and the gasoline was placed in the fuel tanks of the ferry and motor vehicle prior to their entry into the taxing state. There was no storage or withdrawal from storage of the gasoline after its entry into the state and the tax was not, of course, asserted to be due by reason of any storage or withdrawal from storage, but could only be based upon the use of the gasoline, which was at all times a use in interstate commerce. The cases are, accordingly, in no sense in conflict with the *Nashville* and *Edelman* cases, nor do they, in view of the storage and installation of appellant's property in California after the termination of its interstate shipment to the state and before its use

in the operation of appellant's railroad, offer any support to appellant's position.

In the *Coverdale* case the *Helson* case, *supra*, and the *Cooney* case, 294 U. S. 384, were distinguished, the court saying, with reference to these two cases:

> "We think they belong to the category of cases which construe the state tax acts involved as taxes on interstate commerce and its instrumentalities rather than on operations closely connected with but distinct from that commerce. In the *Interstate* case (*State Tax Commission* v. *Interstate Natural Gas Co., Inc.*, 284 U. S. 41) and the *Cooney* case taxes levied on the business of engaging in interstate commerce were held invalid. Likewise, in the *Helson* case, this court concluded that the tax on gasoline brought into the state and used on an interstate ferry was analogous to a tax on the use of the ferry itself in transit and therefore within the rule prohibiting state taxes on commerce. A narrow distinction in fact exists between the tax held invalid in the *Helson* case and the valid tax considered in *Nashville, Chattanooga and St. Louis Ry. Co.* v. *Wallace*, 288 U. S. 249, where a tax on gasoline brought into the state, stored and then used to drive engines in interstate transportation, was held valid. The storage and withdrawal was an intrastate, taxable event. See also *Edelman* v. *Boeing Air Transport*, 289 U. S. 249, 252; *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472, 479."

The *Coverdale* case is of importance here for other reasons as we will try to develop.

Appellant's case is based on the premise that the use tax is exacted for the privilege of using the materials and supplies in the operation of appellant's interstate commerce business. However, as the act is written and administered it taxes only the privilege of local storage, use or consumption.

In the *Coverdale* case this court stated the question as follows:

> "The question is whether a state statute imposing a privilege tax on the production of mechanical power contravenes the interstate commerce clause in so far as it is applied to an engine used to supply mechanical power to a compressor which increases the pressure of natural gas and thus permits it to be transported to purchasers in other states."

The court was of the opinion that the state statute did not contravene the commerce clause because:

(1) The tax fell alike on those engaged in interstate or in intrastate commerce, or in both;

(2) Privileges, closely connected with the (interstate) commerce may be regarded as distinct for purposes of taxation;

(3) Increased cost alone is not sufficient to invalidate the tax as an interference with interstate commerce;

(4) The tax can not be imposed by another state.

Applying those tests to the present case we see that:

(1) The use tax falls alike on everyone regardless of the type of business engaged in and, therefore, is nondiscriminatory.

(2) The use tax does not burden appellant's interstate commerce in that

(a) It taxes a privilege which is merely closely connected with appellant's interstate commerce, that is, storage, installation or intrastate use.

(b) It might add to appellant's costs the same as a property tax, but cost alone is not sufficient.

(c) No other state can tax the privilege of storing, installing or using (in intrastate business) the materials and supplies in the State of California.

Appellant attaches great significance to its asserted predetermined intent to use all tangible personal property purchased by it in the operation of its intermingled interstate and intrastate railroad system. It may be stated at the outset that all the property purchased by the appellant is not ultimately used in the course of its operations, but that some portion thereof is sold or devoted to other uses (R. 120-126). Even though it be assumed, however, that there existed a predetermined intent on the part of appellant to use all property purchased by it in its intermingled interstate and intrastate operation and the property was actually so used, such intent and use,

would not preclude under the *Nashville* and *Edelman* cases the application of the tax to the storage or installation of the property. In these cases liability to pay the tax in question arose at the time of the withdrawal of gasoline from storage for use in interstate commerce. The conclusion is, accordingly, inescapable that at the time the taxes were imposed there was a predetermined intent on the part of the carriers to use the gasoline in interstate commerce, for the gasoline was at that time placed in the fuel tanks of the carriers. Furthermore, the court's statement of facts in the *Nashville* case clearly indicates that none of the gasoline purchased by the railroad outside the taxing state and stored within the state was sold, but that all was withdrawn and used by it as a source of motive power in interstate railway operation. Authorities such as *Coe* vs. *Errol,* 116 U. S. 517; *Minnesota* vs. *Blasius,* 290 U. S. 1; *Oliver Iron Min. Co.* vs. *Lord,* 262 U. S. 172; *Eastern Air Transport* vs. *Tax Commission,* 285 U. S. 147; *Superior Oil Co.* vs. *Mississippi,* 280 U. S. 390, and *American Airways* vs. *Wallace,* 57 Fed. (2d) 877, 880, 287 U. S. 565, also establish that the actual status of property rather than the intent of the owner thereof is the controlling factor in determining whether the commerce clause precludes the application of a state tax. It is submitted, accordingly, that appellant's contention that the tax can not be applied with respect to its property in view

of its asserted predetermined intent to use that property in interstate commerce is wholly without merit.

The burden of appellant's argument is the familiar one, variously stated but consistently found in practically all cases involving taxation of interstate railroads, to the effect that the tax in question imposes a direct burden upon interstate commerce and is therefore in violation of the provisions of Article I, section 8, clause 3, of the Federal Constitution and that it deprives the company of its property without due process of law, and denies it the equal protection of the laws. That these contentions are unsound in the case at bar is, we submit, completely established by the cases hereinabove referred to.

IV

"The Unconstitutionality of State Excise Taxation Burdening Interstate Commerce Is Not Avoided by Imposing State Taxes at an Equal Rate on Intrastate Commerce or Other Intrastate Privileges"

In its argument here it seems to us that appellant falls into error in assuming for the purpose of the argument that the tax in question imposes a direct burden upon interstate commerce. In the foregoing part of our brief we have endeavored to show that there is no burden, direct or indirect, upon interstate commerce, and we have cited

numerous cases which appear to us to be determinative of that question.

But under this heading appellant introduces the proposition that if it be held that the tax is validly imposed because it is an excise tax on intrastate commerce, municipalities and other subdivisions of the state could exercise a like taxing power, and from this point appellant advances to the proposition that the intervening states and their municipalities could all impose taxes upon the same property, to the total destruction of interstate commerce.

The argument falls of its own weight because the tax in question is not upon the privilege of engaging in interstate commerce. It is suggested by appellant, but not in any way confirmed, that if the tax in question here is sustained, "every county, city, town and village in the United States could and undoubtedly would impose excise taxes upon the privilege of using railroad property or maintaining a station or a ticket office or some other action essential to the carrying on of railroad transportation" (appellant's brief, p. 29).

Whether appellant is justified in drawing this dire picture of the destruction of interstate transportation by confiscatory taxation is beside the point; certainly in this case we are not confronted with any such problem as it seems obvious that no other state could tax the storage, use or consumption of property *in California*.

In this connection reference is again made by appellant to the *Helson* case but since that case, for reasons hereinbefore referred to, is not in point we believe this line of argument need not be pursued any further.

Appellant also refers here to *Adams Mfg. Co.* vs. *Storen*, 304 U. S. 307, decided on May 16, 1938.

The *Adams* case involved an Indiana statute imposing a *gross receipts* tax on commerce. This court held (Mr. Justice Black dissenting) that the tax was unconstitutional under the commerce clause because "such a tax is a regulation of, and a burden upon, intertsate commerce prohibited by Article I, section 8, of the constitution."

However, the court pointed out that the vice of the statute lay in the fact that the tax included in its measure, without apportionment, receipts from activities in interstate commerce and that if lawful it could be laid to the fullest extent by states in which the manufactured goods were sold, and thus interstate commerce would be subjected to the risk of a double tax burden to which intrastate commerce is not exposed and which the commerce clause forbids.

We have no quarrel with the decision in the *Adams* case and respectfully submit that it is not in point here in any respect.

V

"This Tax Is Directly Imposed Upon the Privilege of Engaging in Interstate Commerce and Therefore Is an Undue and Unconstitutional Burden on Such Commerce"

Here we find appellant making the same argument already made under other headings to the effect that the tax in question is a direct burden upon interstate commerce. Appellant approaches the argument from a slightly different angle inasmuch as there is here cited cases which go back many years in point of time even to and including that familiar stand-by, *McCulloch* vs. *Maryland,* 4 Wheat. 316, which has been cited, it seems to us, in support of almost every question involving protection by the federal constitution from state taxation.

Appellant discusses here the boundaries beyond which state taxation (in respect to interstate commerce) is not permitted. As appellant concedes (brief, p. 31) the general rule respecting state taxation of interstate commerce is not so applied as to relieve those engaged in such commerce from their just share of state taxes. It is also true that this court has observed at least one boundary beyond which state taxation is not permitted and, generally speaking, that boundary is reached when the effort is to impose direct taxation upon the privilege of engaging in interstate commerce. The

real issue in this case, as we see it, is whether the statute in question passes the boundary erected against state action. Appellant's insistence is that it does, but we think appellant has wholly failed to prove its point either in fact or in law. On the other hand, the facts as well as the applicable court decisions show that the statute is well within the permissible boundary.

At this point, and generally throughout its brief, appellant has attempted to distinguish the case of *Henneford* vs. *Silas Mason Co.* (1937), 300 U. S. 577, from the instant case. In the *Silas Mason* case this court upheld the validity of the compensating tax of the State of Washington, a tax which is essentially identical with the tax involved herein. While it is true that the case did not involve the application of the tax with respect to property subsequently used in interstate and intrastate commerce, it clearly established the validity of a state tax upon the storage or use of tangible personal property in the State after the termination of the interstate shipment of the property. Further discussion of this point is unnecessary for as the court stated,

> "A tax upon the privilege of use or storage when the chattel used or stored has ceased to be in transit is now an impost so common that its validity has been withdrawn from the arena of debate. *Nashville, C. & St. L. Ry. Co.* v. *Wallace, Supra; Edelman* v. *Boeing Air Transport Inc., Supra; Monamotor Oil Company* v.

Johnson, Supra; Cf. Vancouver Oil Co. v. Henneford, Supra". (300 U. S. 577, 583.)

It is certainly significant that the court cited as authority for this most emphatic statement the *Nashville* and *Edelman* cases upon which appellees herein place their principal reliance.

The Washington statute allowed an exemption from the tax to the extent to which the sale or use of the property was already subjected to a tax under the laws of the state or some other state; the California act, however, allows an exemption from the tax only in cases in which the California retail sales tax applies with respect to the sale of the property. This difference is believed to be wholly immaterial, for as the court clearly indicated in the *Silas Mason* case, at page 587 of its opinion, the exemption allowed in the Washington statute with respect to taxes paid other states was not essential to the validity of the tax. It may also be observed that the South Carolina act upheld in the case of *Gregg Dyeing Company* vs. *Query*, 286 U. S. 472, relied upon in the *Silas Mason* case, limited the exemption from the tax thereby imposed to gasoline with respect to which another tax had been paid to that state. The tax acts upheld in the *Nashville* and *Edelman* cases, likewise did not allow an exemption or credit in cases in which taxes were paid to other states. In any event, the matter of an offset or credit for taxes paid other states is not involved herein for it has not been asserted that a

sales tax or any form of tax has been imposed by another state with respect to the property in question.

There can be no doubt but that the California tax would be valid as a property tax. *Johnson Oil Refining Co.* vs. *Oklahoma* (1933), 290 U. S. 158, and cases cited therein. It is noteworthy that in its opinion in the *Silas Mason* case the court likened the Washington tax to a property tax and relied upon cases upholding taxes on property used in interstate commerce. In the course of its opinion the court stated:

> "The privilege of use is only one attribute, among many, of the bundle of privileges that make up property or ownership. *Nashville, C. & St. L. Ry. Co.* v. *Wallace, Supra; Bromley* v. *McCaughn,* 280 U. S. 124, 136-138; *Burnet* v. *Wells,* 289 U. S. 670, 678. A state is at liberty, if it pleases, to tax them all collectively, or to separate the faggots and lay the charge distributively. Ibid. Calling the tax an excise when it is laid solely upon the use (*Vancouver Oil Co.* v. *Henneford,* 183 Wash. 317, 49 P. (2d) 14) does not make the power to impose it less, for anything the commerce clause has to say of its validity, than calling it a property tax and laying it on ownership. 'A nondiscriminatory tax upon local sales * * * has never been regarded as imposing a direct burden upon interstate commerce and has no greater or different effect upon that commerce than a general property tax to which all those enjoying the protection of the State may be subjected.'

Eastern Air Transport, Inc. v. *South Carolina Tax Comm'n*, 285 U. S. 147, 153." (300 U. S. 577, 582.)

"But the fact that the legislature has chosen to lay a tax upon the use of chattels that have been bought does not make the tax upon the use a tax upon the sale. One could argue with as much reason that there would be a tax upon the sale if a property tax were limited to chattels so acquired." (300 U. S. 577, 587.)

The California Use Tax Act does not impose a tax upon appellant's transportation business; it does not impose a tax upon the privilege of engaging in that business, nor does it impose a tax upon the gross receipts from such business.

It does impose a tax upon the privilege of storing, using or consuming property in the state, such property being admittedly used in inextricably commingled interstate and intrastate commerce.

Such a tax, we submit, is well within permissible boundaries and has been approved by this court.

Gregg Dyeing Co. vs. *Query, supra;*
Nashville, etc. Ry. Co. vs. *Wallace, supra;*
Southern Natural Gas Corporation vs. *Alabama, supra;*
Western Live Stock vs. *Bureau of Revenue, supra;*
Coverdale vs. *Arkansas Louisiana Pipe Line Company, supra,*

and other cases cited herein.

VI

"The Tax Is Extra-Territorial in Its Operation and Effect and in Violation of the Due Process Clause of the Federal Constitution"

Appellant refers at page 46 of its brief to "the foregoing statement of facts" by which we assume reference is intended to the "Stipulation of Facts" (R. 71), but we are not informed as to which paragraphs of the stipulation of facts are intended to be referred to. However, since reference is made to "general stores and purchasing department," we assume that paragraphs 21 to 26 (R. pp. 78-9), both inclusive, are the particular paragraphs to which attention is intended to be drawn.

The gist of appellant's argument here appears to be this:

That after railroad materials and supplies are shipped to California and the interstate transportation thereof is terminated, such materials and supplies are devoted to railroad uses in such a manner that an indeterminable portion thereof may be installed in interstate trains and used partly within and partly without the state in the course of the movement of the interstate train. That "when the full measure of the use tax is imposed upon an inseparable part of use, a small part of which use might occur within California, the remaining use occurring in other states, such imposition makes a direct tax and burden on the operations of interstate commerce in other states."

Appellant then says:

> "It is settled that a state cannot, in the guise of excise taxation, impose charges which result in taxing things, actions or privileges wholly beyond her jurisdiction and control. Such a tax is in conflict with the due process clause of the Fourteenth Amendment to the Constitution of the United States."

It seems to us that the foregoing merely begs the question and does not advance the argument beyond the scope of the contentions previously made by appellant. In other words, the argument simply assumes, without support in the record, that the tax in question is upon *interstate* commerce instead of being solely upon the *intrastate* storage, use or consumption, whichever first occurs.

The case of *Norfolk, etc. Railroad Company* vs. *Pennsylvania*, (1890), 136 U. S. 114, cited here by appellant, is obviously not in point. That case involved a state act imposing an annual license tax upon foreign corporations for the privilege of keeping an office in the state for the use of officers, stockholders, agents and employees. The tax was measured by a percentage of the authorized capital stock of the corporation.

It was held that the "office was maintained because of the necessities of the interstate business of the company, and for no other purpose. A tax upon it was, therefore, a tax upon one of the means or instrumentalities of the company's interstate commerce; and as such was in violation of the commer-

cial (sic) clause of the Constitution of the United States."

We need not discuss in detail the *Norfolk* case. The facts of that case are not present here. In any event, we submit that the *Coverdale* case, *supra*, is much more nearly apposite in its facts to the case at bar, and that under the authority of that case the tax here in question must be upheld.

In the *Coverdale* case this court said:

"The language of the state statute makes it quite certain that this privilege tax falls alike on those engaged in interstate or in intrastate commerce, or in both. While a privilege tax by a state for engaging in interstate business has frequently met the condemnation of this Court as a regulation of commerce, privilege taxes for 'carrying on a local business,' even though measured by interstate business, have been sustained. *American Mfg. Co.* v. *St. Louis*, 250 U. S 459; *Ficklen* v. *Shelby County Taxing District*, 145 U. S. 1; cf. *Western Live Stock* v. *Bingaman*, 303 U. S. ____, No. 322. October Term, 1937, decided February 28, 1938. The present case falls well within the line of state tax authority.

"Taxation by the states of the business of interstate commerce is forbidden only because it is deemed an interference with that commerce, the uniform regulation of which is necessarily reserved to the Congress. Minnesota Rate Cases, 230 U. S. 352, 400. As this source of revenue, even if treated in a non-discriminatory manner, is withdrawn from local reach by

inference from the delegated grant, the exemption of those engaged in interstate commerce from the taxation others bear should not be extended beyond the necessity of keeping that commerce free from interference. Consequently, property taxes on the instrumentalities or net income taxes on the proceeds of interstate commerce are upheld. *Cudahy Packing Co.* v. *Minn.*, 246 U. S. 450; *United States Glue Co.* v. *Oak Creek*, 247 U. S. 321.

"Privileges closely connected with the commerce may be regarded as distinct for purposes of taxation. So, local privilege taxes on storage in transit, compressing or dealing in cotton, already moving in its interstate journey from plantation to mill, are validated as imposed upon operations in connection with a commodity withdrawn from the transportation movement. *Federal Compress Co.* v. *McLean*, 291 U. S. 17, 21; *Chassaniol* v. *Greenwood*, 291 U. S. 584; cf. *Minnesota* v. *Blasius*, 290 U. S. 1. And similar taxes are upheld for the privilege of mining ores or producing gas, notwithstanding the 'practical continuity' of the taxed productive operation and the interstate movement. *Oliver Iron Co.* v. *Lord*, 262 U. S. 172; *Hope Gas Co.* v. *Hall*, 274 U. S. 284. In *Utah Power and Light Company* v. *Pfost*, 286 U. S. 165, an Idaho statute taxing the generation of electricity at so much a kilowatt hour was upheld because a difference was perceived between the conversion of the mechanical energy of falling water into electrical energy and the transportation of the latter. The tax here imposed on

the operation of the machinery is of the same type."

Appellant Has Not Sustained the Burden Imposed on It of Proving an Illegal Interference With Its Interstate Commerce

We have denied all the allegations in appellant's complaint referring to an alleged burden imposed upon appellant's interstate commerce by the use tax. Therefore, the record must be searched to determine if appellant has proved an illegal burden.

The only reference in the record that might be said to have a remote bearing upon this question is the following:

> "By reason of its inextricably intermingled interstate, foreign and intrastate commerce and business, plaintiff is compelled to purchase from points outside of California and to use and consume a greater amount of tangible personal property than it would be required to purchase if it were engaged only in intrastate railroad transportation business." (R-126.)

In the *Pacific Telephone & Telegraph* case, *supra*, at page 413, the court said:

> "* * * But the high tax on the local privilege, like the low rate for the local traffic, if it burdens interstate commerce at all, does so by reason of its consequences. This being so, a tax upon the local privilege only must be held valid in the absence of proof that it imposes an undue burden upon interstate commerce. 'The question of constitutional validity is not to be

determined by artificial standards.' See *Gregg Dyeing Co.* v. *Query,* 286 U. S. 472, 480, 52 S. Ct. 631, 634, 76 L. Ed. 1232, 84 A. L. R. 831. The alleged indirect tax must be judged by its practical operation.

"*In its effect upon interstate commerce an occupation tax solely upon local business does not differ from an ad valorem property tax upon tangible property used exclusively in such business.* Each increases the necessary cost of doing the local business. Either might conceivably be so large as to render the local business immediately unprofitable. A common carrier cannot be compelled to carry on business indefinitely at a loss. *Brooks-Scanlon Co.* v. *Railroad Commission,* 251 U. S. 396, 40 S. Ct. 183, 64 L. Ed. 323; *Bullock* v. *Florida,* 254 U. S. 513, 520, 521, 41 S. Ct. 193, 65 L. Ed. 380; *Railroad Commission* v. *Eastern Texas R. Co.,* 264 U. S. 79, 85, 44 S. Ct. 247, 68 L. Ed. 569. If, because of such loss, a corporation, seeing no prospect of betterment, wished to discontinue its local business and were prevented by law from doing so unless it discontinued also its interstate business, the law might be held void as imposing an unconstitutional condition upon the privilege of engaging in interstate commerce. Compare *Pullman Co.* v. *Adams,* 189 U. S. 420, 23 S. Ct. 494, 47 L. Ed. 877. If it was the tax which caused the unprofitableness of the local business and, consequently, the desire to discontinue it, the tax would then appear as a direct burden on interstate commerce. Compare *Postal Telegraph-Cable Co.* v. *Richmond,* 249 U. S. 252, 258, 39

S. Ct. 265, 63 L. Ed. 590; *Postal Telegraph-Cable Co.* v. *Fremont,* 255 U. S. 124, 127, 41 S. Ct. 279, 65 L. Ed. 545. But no reason has been suggested why a tax upon the local business should be held void, if, despite its burden, the local business is conducted at a profit; or if, although conducted at an apparent loss, the corporation desires to continue it because of benefits present or prospective. Compare Ohio Tax Cases, 232, U. S. 576, 590, 34 S. Ct. 372, 58 L. Ed. 737.

"Second. Inherently the tax challenged is unobjectionable. It is not upon an instrumentality of interstate commerce; it is moderate in amount; and is not a disguised attempt to discriminate against interstate commerce. As the collection is being made by an action at law, the tax is not open to the objection raised in *Western Union Telegraph Co.* v. *Massachusetts,* 125 U. S. 530, 554, 8 S. Ct. 961, 31 L. Ed. 790, that payment may be made a condition of continuing to do business. Compare *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S. 113, 119, 41 S. Ct. 45, 65 L. Ed. 165. The tax is 'imposed solely on account of the intrastate business;' and it appears that the amount exacted is not increased 'because of the interstate business done.' Compare *East Ohio Gas Co.* v. *Tax Commission,* 283 U. S. 465, 470, 51 S. Ct. 499, 500, 75 L. Ed. 1171. Although the two branches of the business of the companies are inseparable, the tax is not laid inseparably upon both. Thus it is not open to the objection held fatal in *Leloup* v. *Mobile,* 127 U. S. 640, 8 S. Ct.

1380, 32 L. Ed. 311, and *Cooney* v. *Mountain States Telephone & Telegraph Co.*, 294 U. S. 384, 55 S. Ct. 477, 79 L. Ed. 934. 'Certainly one cannot avoid a tax upon a taxable business by also engaging in a nontaxable business.' *Raley & Bros* v. *Richardson*, 264 U. S. 157, 159, 44 S. Ct. 256, 257, 68 L. Ed. 616. * * *"

When we consider that appellant uses every article that it purchases in conducting its *intrastate* commerce and that we do not find any reference in the complaint or the stipulation to the possible effect of the tax on appellant's profits or losses along with the *general* statement that appellant is compelled to purchase, use and consume a greater amount of property than it would purchase if it were engaged only in intrastate commerce, we submit that appellant *has not sustained* the burden imposed upon it of proving a *direct* interference upon interstate commerce resulting from the imposition of this tax.

Certainly there might possibly be some remote burden, but in the case of property taxation on instrumentalities of interstate commerce we also find a remote burden which has been repeatedly held to be insufficient to invalidate the tax.

This court has recognized that the power to tax is vital to a state, and it has given to that power a form which permits some incursion on interstate commerce; i.e., it is only when the tax directly interferes with interstate commerce that it is invalidated.

If appellant were engaged solely in intrastate commerce, there would be no question of the validity of the tax in question—*Henneford* vs. *Silas Mason Co., supra;* therefore, we submit that such a tax can not be invalidated by the mere fact that appellant also uses the same property in its interstate commerce. (*Pac. Telephone & Telegraph* case, *supra.*)

Appellant does not show the quantity that must be purchased solely because of its interstate commerce, or state in any way how this tax imposed solely on *intrastate* use directly burdens its interstate commerce.

We submit that appellant has not proved that the tax imposed solely upon intrastate use of the materials would burden its interstate commerce.

In conclusion we submit that in the case at bar there has been no attempt to tax things, actions or privileges beyond the jurisdiction or control of the state, but that, on the contrary, the tax in question has its incidence only in relation to things, actions or privileges existing, taking place or exercised within the state and, therefore, within the boundaries of permissible taxation as delimited by this court.

Respectfully submitted.

U. S. WEBB,
Attorney General,

H. H. LINNEY,
Deputy Attorney General,

JAMES J. ARDITTO,
Deputy Attorney General,
Attorneys for Appellees.

o

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1938

Nos. 212-213

SOUTHERN PACIFIC COMPANY, *Appellant*,
vs.
JOHN C. CORBETT *et al.*, *Appellees*. — No. 212

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, *Appellant*,
vs.
JOHN C. CORBETT *et al.*, *Appellees*. — No. 213

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF OF ATTORNEY GENERAL OF WASHINGTON ET AL., AMICI CURIAE

And petition for leave to file.

G. W. HAMILTON,
Attorney General of the State of Washington,
R. G. SHARPE,
Assistant Attorney General of the State of Washington,
Amici Curiae.

Temple of Justice, Olympia, Wash.

STATE PRINTING PLANT, OLYMPIA, WASHINGTON

IN THE

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OF THE

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Come now G. W. Hamilton, Attorney General of the State of Washington, and R. G. Sharpe, Assistant Attorney General of the State of Washington, and move the Court for an order permitting said G. W. Hamilton and R. G. Sharpe to file the annexed brief *amici curiae* in the above entitled appeals.

This motion is based upon the records and files in said appeals and upon the attached affidavit of R. G. Sharpe.

G. W. HAMILTON,
Attorney General of the State of Washington,

R. G. SHARPE,
Assistant Attorney General of the State of Washington,
Amici Curiae.

State of Washington, }
} ss.
County of Thurston, }

R. G. Sharpe, being first duly sworn, on oath, deposes and says: That G. W. Hamilton who signed the foregoing motion, is the duly elected, qualified and acting Attorney General of the State of Washington, and affiant is the duly appointed, qualified and acting Assistant Attorney General of the State of Washington; that ever since 1935 the statutes of Washington, to-wit: Title IV, chapter 180, Laws of Washington of 1935 and chapter 191, Laws of Washington of 1937, have imposed, and do now impose, an excise on the users in Washington of tangible personal property purchased at retail, and of the same general kind and nature as that imposed by the statutes of California, the validity of which, as applied to interstate railroads and telephone companies, is involved in the above appeals, and that the decision in said appeal will in large measure be determinative of the validity of the excise so imposed by the Washington statutes as applied to the activities of said companies, and that the State of Washington is therefore directly interested in the outcome of said appeals.

This affidavit is made in support of the attached motion for leave to file a brief *amici curiae*.

R. G. SHARPE.

Subscribed and sworn to before me this 3rd day of December, 1938.

[redacted]
Notary Public in and for the State of Washington,
residing at Olympia.

GEO. L. HARRIGAN
NOTARY PUBLIC IN AND FOR THE STATE OF
WASHINGTON, RESIDING AT OLYMPIA

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APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF OF ATTORNEY GENERAL OF WASHINGTON ET AL., AMICI CURIAE

ARGUMENT

From the facts revealed by their respective records, it is apparent that the controlling principles of law are the same in each of these two appeals. For this reason it is thought proper to express our views in a single brief wherein we will, for brevity's sake, refer to the appellees (plaintiffs below) as the "utilities."

As applied to chattels used as part of the Utilities' interstate plants, California "use" tax is not void as a direct tax on interstate commerce.

It is, of course, well settled that a State cannot lay a tax upon interstate commerce in any form. 7 Encyc. of U. S. Sup. Crt. Repts., pp. 441-443. Examples of State excises held invalid under this rule are set forth in the footnote.*

But this rule must not be extended beyond necessity of keeping interstate commerce free from interference.

"Taxation by the states of the business of interstate commerce is forbidden only because it is deemed an interference with that commerce, the uniform regulation of which is necessarily reserved to the Congress. *Minnesota Rate Cases*, 230 U. S. 352, 400. As this source of revenue, even if treated in a non-discriminatory manner, is withdrawn from local reach by inference from the delegated grant, the exemption of those engaged in interstate commerce from the taxation others bear should not be extended beyond the necessity of keeping that commerce free from interference. Consequently, property taxes on the instrumentalities or net income taxes on the proceeds of interstate commerce are upheld.

---

* Tax on telegraph office handling local and interstate messages. *Leloup v. Mobile*, 127 U. S. 640; Tax of $50.00 a car on all sleeping cars used in state in both inter- and intrastate business. *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34; Tax of $5 per wagon and 50 cents per driver, on express wagons used indiscriminately in inter- and intrastate business, *Adams Express Co. v. N. Y.*, 232 U. S. 14; Tax of $50 for each gasoline distributing station engaged in making both local and interstate sales, *Bowman v. Continental Oil Co.*, 256 U. S. 642; Tonnage tax on interstate freight destined to or originating in state, *State Freight Tax Case*, 15 Wall. 232; Tax on railroad interstate revenues earned within state, *Galveston, etc., Ry. Co. v. Texas*, 210 U. S. 217; Tax on state's allocated proportion of interstate revenues from telephone service. *New Jersey Bel. Tel. Co. v. State Board*, 280 U. S. 338; Tax on telephone company of so much for each telephone instrument, whether used in interstate or intrastate business, or both, *Cooney v. Mountain States Tel. Co.*, 294 U. S. 384; Tax on gasoline used by interstate ferry doing no local business, and already in ferry's tanks when entering taxing state. *Helson v. Kentucky*, 279 U. S. 245; Tax on gasoline used by interstate stage and already in carrier's tanks when entering state. *Bingaman v. Golden Eagle Stages*, 297 U. S. 626.

Cudahy Packing Co. v. Minnesota, 246 U. S. 450; *United States Glue Co. v. Oak Creek*, 247 U. S. 321." *Coverdale v. Pipe Line Co.*, 303 U. S. 604, 610.

It is our position that as applied to the Utilities, the California "use" tax is no more a direct tax on interstate commerce than is an ordinary *ad valorem* tax imposed by the states through which such Utilities operate.

Same—California "use" tax and retail sales tax statutes should be construed together to discover whether either or both constitute a direct tax on appellants' interstate activities.

Chapter 1020, Laws of California of 1933, provided:

"Sec. 3. For the privilege of selling tangible personal property at retail a tax is hereby imposed upon retailers at the rate of two and one-half per cent of the gross receipts of any such retailer from the sale of all tangible personal property sold at retail in this State on and after August 1, 1933, and to and including June 30, 1935; and at the rate of two per cent of the gross receipts of any such retailer from the sale of all tangible personal property sold at retail in this State on and after July 1, 1935. Such tax shall be paid at the time and in the manner hereinafter provided and shall be in addition to any and all other taxes.

* * * * * * * * * *

"Sec. 8½. The tax hereby imposed shall be collected by the retailer from the consumer in so far as the same can be done. * * *."

By chapter 355, Laws of California of 1935, section 3 was amended to read as follows:

"Sec. 3. For the privilege of selling tangible personal property at retail a tax is hereby imposed upon retailers * * * at the rate of three per cent of the gross receipts of any such retailer from the sale of all tangible personal property sold at retail in this State on and after July 1, 1935. * * *."

Section 3 of the California "Use Tax Act of 1935" (ch. 361, Laws of Calif. of 1935) provides:

"Sec. 3. An excise tax is hereby imposed on the storage, use, or other consumption in this State of tangible personal property purchased from a retailer on or after July 1, 1935, for storage, use or other consumption in this State at the rate of three per cent of the sales price of such property. * * *"

By section 4 there was exempted from the operation of such "use" tax, gas, electricity, water, gold bullion, gold concentrates, gold precipitates, property used for the performance of public works contracts executed prior to August 1, 1933, motor vehicle fuel otherwise taxed, and food products purchased for human consumption.

By chapter 401, Laws of California of 1937, locally built ships in excess of 1,000 tons burden, were also exempted.

The retail sales tax act of 1933, as amended, contains the same exemptions as the 1935 "use" tax act. (Sec. 5, ch. 1020, Laws of Calif. of 1933, as amended by ch. 355, Laws of Calif. of 1935; ch. 400, Laws of Calif. of 1937.)

From this it seems plain that the California retail sales tax act of 1933 as amended, and the California 1935 "use" tax act are in *pari materia*, and were intended as complimentary measures enacted with the purpose of collecting a portion of the expense of government from the state's inhabitants measured by the individual's ability to acquire and enjoy the use of tangible personal property. Without the "use" tax, the burden would have fallen unequally since those making purchases in other states or in interstate commerce would have escaped the tax. The "use" tax was obviously intended to make the burden equal and uniform.

We submit, therefore, that the two acts must be construed together to discover whether either or both amount to an unlawful burden on interstate commerce. *Gregg Dyeing Co. v. Query*, 166 S. C. 117, 164 S. E. 588, 286 U. S. 472, 479-480; *Baker v. Druesedow*, 263 U. S. 137, 142, and cases cited; *Hinson v. Lott*, 75 U. S. 148, 152-3; *Henneford v. Silas Mason Co.*, 300 U. S. 577, 584.

In the case last cited the Court construed together the Washington "use" tax and retail sales tax measures concluding therefrom that the exaction of the "use" tax after the property had come to rest was not so measured or conditioned as to hamper or discriminate against transactions of interstate commerce.

Same—Court not bound by name given tax.

Where a Federal question is involved, the courts are not bound by the label attached to a tax by the Legislature, the courts, or local administrative officers, but will determine for themselves the true nature of the tax by ascertaining its operation and effect. *Western Union Tel. Co. v. Kansas*, 216 U. S. 1; *Mugler v. Kansas*, 123 U. S. 623, 661; *Galveston, etc., Ry. Co. v. Texas*, 210 U. S. 217, 227; *Educational Films Corp. v. Ward*, 282 U. S. 379, 387; *Lawrence v. State Tax Commission*, 286 U. S. 276, 279-280.

For instance,—it would be unimportant that state courts may have held either the same or similar sales or "use" taxes not to be a property tax within the contemplation of the local constitution requiring uniformity of property taxation,—and for this reason:

The federal courts' conclusion as to whether a given state tax offends the commerce clause must, of necessity, be of uniform application in each of the several states.

Let us suppose these identical tax measures appeared on the statute books of each of two states. Would this Court adjudge invalid as violative of the commerce clause the statutes of one state because its courts had declared such taxes to be excises, and sustain the identical statutes of the other because called by the courts of that state, a property tax? Obviously not. The effect of a state tax on interstate commerce cannot, we submit, be influenced by the particular label placed upon such tax by the local courts. The same law must be as inoffensive or obnoxious to the commerce clause in Colorado as in Indiana.

See in this connection, *Eastern Air Transport Inc. v. South Carolina Tax Commission*, 52 Fed. (2d) 457, 285 U. S. 147, 152.

Same—Construed together, the California retail sales tax and "use" tax are no more burdensome to interstate commerce than is the ordinary property tax.

A property tax is ordinarily fixed at a certain rate on the market value of property. The California sales and "use" taxes are measured by a constant rate—three per cent—applied to the *best evidence of the property's value*, namely, its purchase price new. Both are paid by the one acquiring title—the sales tax by the purchaser, and the "use" tax by the one purchasing and using the property within the state. Both are uniform as to application, since with unimportant exceptions, they apply uniformly to all articles purchased after July 1, 1935.

The sales or "use" tax being collected but once, represents the particular property's only contribution to the expense of government up to the time of its first regular assessment for ad valorem tax purposes. Then, if the per-

sonalty purchased locally or purchased elsewhere and used locally is still in California on the assessment date, it is subject either to a personal property tax, or, if incorporated into fixtures, to a real property tax.

Thus, in practical effect, all chattels used in California and purchased after July 1, 1935, are subject to a 3% sales or "use" tax imposed but once, and measured by 3% of their value, and thereafter are subject to the ordinary, periodically-imposed *ad valorem* property tax.

Let us assume that, instead of the offending tax, and in addition to its other property taxes assessed annually, California had undertaken to levy an *ad valorem* tax at a uniform rate upon all chattels acquired after a certain date, and having their actual situs within the state. Such a tax, being both in name and effect, a true property tax, could not, even as to chattels used by interstate utilities, be held violative of the commerce clause. Yet in what way would it be less burdensome to interstate commerce, than the state "use" and sales taxes now before us? Obviously the tax burden is precisely the same, whether the exaction be conditioned on the purchase or use of property or be conditioned on its mere ownership.

"In its effect upon interstate commerce an occupation tax solely upon local business does not differ from an *ad valorem* property tax upon tangible property used exclusively in such business." *Pac. Tel & Tel. Co. v. Tax Commission*, 297 U. S. 403, 413.

"Calling the tax an excise when it is laid solely upon the use (*Vancouver Oil Co. v. Henneford*, 183 Wash. 317; 49 P. (2d) 14) does not make the power to impose it less, for anything the commerce clause has to say of its validity, than calling it a property tax and laying it on ownership. 'A nondiscriminatory tax upon local sales * * * has never been regarded as imposing a direct burden upon interstate commerce and has no greater or different effect

upon that commerce than a general property tax to which all those enjoying the protection of the State may be subjected.' *Eastern Air Transport Inc. v. South Carolina Tax Comm'n*, 285 U. S. 147, 153." *Henneford v. Silas Mason Co.*, 300 U. S. 577, 582-3.

And see *Brown v. Maryland*, 12 Wheat. 419, and *Cook v. Pennsylvania*, 97 U. S. 566, holding that in its effect on foreign commerce, a tax on the sale of an imported article is equivalent to a tax on the goods sold.

California "use" tax is nondiscriminatory and cannot result in multiple taxation, and hence, as applied to chattels used as part of the plants of interstate utilities, does not unlawfully burden interstate commerce.

Nondiscriminatory state taxes not imposed directly on interstate commerce, but affecting it only incidentally and remotely, are held not to violate the commerce clause. *Hump Hairpin Mfg. Co. v. Emmerson*, 258 U. S. 290, 294; *Western Cartridge Co. v. Emmerson*, 281 U. S. 511, 514; *Nashville, C. & St. L. Ry. v. Wallace*, 288 U. S. 249, 267-8; *Southern Gas Corp. v. Alabama*, 301 U. S. 148, 157.

A seemingly controlling test for determining when a nondiscriminatory state tax constitutes a forbidden direct burden on interstate commerce, and when a permissive indirect or incidental burden, is the possibility of multiple taxation. If the tax is not one which in form or substance can be repeated by other states in such manner as to lay an added burden on interstate commerce, it is valid, and *vice versa*. *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250, 260; *Coverdale v. Arkansas-Louisiana Pipe Line Co.*, 303 U. S. 604, 612-3; *Adams Mfg. Co. v. Storen*, 304 U. S. 307, 311-312.

Using this test, it is apparent that the California "use" tax act as applied to chattels incorporated and used

in a utility's interstate plant, does not unlawfully burden interstate commerce. No other state in which the utility operates can exact of such utility a tax for the privilege of using fixed property in California. They could, of course, impose use taxes, but only with respect to the use of property within the taxing State.

It is urged by the Southern Pacific Company that "the Use Tax Act is discriminatory in the respect that it fails to provide any exemption for sales or other excise taxes which may be imposed upon the same property by other states before its sale in interstate commerce to purchasers in California." (Appellant's Brief, in Appeal 212, p. 44.)

The answer is that other states would be powerless to impose a valid sales tax on purchases made in other states, since plainly the normal transaction by which an article purchased in one state for use in another would be an interstate sale as to which no tax could be lawfully exacted either by the state where purchased or by the state to which transported.

Where goods are purchased in one state for transportation to another, the commerce includes the purchase quite as much as it does the transportation, and the transaction is interstate and within the protection of the commerce clause. *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 290; *Lemke v. Farmers Grain Co.*, 258 U. S. 50; *A. G. Spaulding & Bros. v. Edwards*, 262 U. S. 66, 69, 70; *Flanagan v. Federal Coal Co.*, 267 U. S. 222; *Furst v. Brewster*, 282 U. S. 493, 497.

And compare *Adams Mfg. Co. v. Storen*, 304 U. S. 307.

It is equally obvious that neither the state of origin

nor any other state through which the chattel is transported could validly tax its use while an article of interstate commerce.

Should so unusual a situation ever arise as where a taxable use were made of an article prior to its arrival in California, appellants would be free to seek relief from the tax involving the particular article by making a claim for exemption as provided by the "use" tax act. It seems a sufficient answer to appellant's contention that the present suits are not based on the refusal of state administrative officers to grant such exemptions.

Same—Pertinent authorities.

Appellants principally rely on *Cooney v. Mountain States Tel. Co.*, 294 U. S. 384, *Helson v. Kentucky*, 279 U. S. 245, and *Bingaman v. Golden Eagle Stages*, 297 U. S. 626.

But the taxes involved in those cases were condemned as amounting in effect to direct taxation of the business of engaging in interstate commerce—in the *Cooney* case, a tax on telephone instruments used in interstate communications, and in the *Helson* and *Bingaman* cases, a tax on gasoline already in the carrier's tanks when entering the state, and used exclusively (in the *Helson* case) in propelling an interstate ferry, and (in the *Bingaman* case) in propelling an interstate motor bus.

Of course, the singling out for taxation purposes of instrumentalities so directly connected with the transmission of interstate messages as telephone sets, might well be held to constitute the direct taxation of such interstate messages themselves.

The same is true of a tax on gasoline consumed directly in the propulsion of an interstate ferry or stage. Gallonage taxes on gasoline used in highway motor vehicles has been said to amount to the same thing as a toll for the use of the highways. (*In re Opinion of the Justices*, 81 N. H. 552, 120 Atl. 629, 631; *Tirrell v. Johnston*, 86 N. H. 530, 171 Atl. 641, 645, affirmed: 293 U. S. 533.) And see *Bingaman v. Golden Eagle Stages*, 297 U. S. 626.

If such a tax amounts to a toll for the use of highways, it would likewise, if applied to gasoline used on interstate ferries, amount to a toll for the use of the navigable water connecting the two states.

The present case we believe to be controlled, rather, by *Coverdale v. Arkansas-Louisiana Pipe Line Co.*, 303 U. S. 604, where a state excise imposed on the production of mechanical power used to propel by compression natural gas through an interstate pipeline was held not to be void as a direct tax or unlawful burden on interstate commerce or transportation. The *Helson* and *Cooney* cases were there distinguished as belonging "to the category of cases which construe the State tax acts involved as taxes on interstate commerce and its instrumentalities rather than on operations closely connected with but distinct from that commerce." (303 U. S. 611.)

Far more removed from direct taxation of interstate commerce, we submit, is a "use" tax of general application and measured by a uniform rate applied to purchase price new, obviously the equivalent of value.

A nondiscriminatory sales tax applied to gasoline purchased by an interstate carrier for use in interstate transportation has been sustained as not constituting a

direct burden on interstate commerce any more than a direct property tax.

Eastern Air Transport, Inc. v. South Carolina Tax Commission, 285 U. S. 147.

Quite obviously, a state tax imposed on sales of goods intended for use, and actually used, in interstate transportation, is no less burdensome to interstate commerce than is a "use" tax measured by the purchase price of articles used locally in such interstate transportation.

And see, also, *The Delaware Railroad Tax,* 18 Wall. 206, 232, sustaining a state tax imposed on an interstate railroad company in addition to all other taxes, and measured by a percentage of the actual cash value of the allocated proportion of every share of its capital stock. Said the Court (p. 232):

"The tax imposed by the act in question affects commerce among the States and impedes the transit of persons and property from one State to another just in the same way, and in no other, that taxation of any kind necessarily increases the expenses attendant upon the use or possession of the thing taxed. That taxation produces this result of itself constitutes no objection to its constitutionality."

Same—Answers to various contentions made by appellants.

Objection that when tax accrues, property involved has been dedicated to public use as part of appellants' interstate plants.

We have shown that the exaction of the "use" tax on appellants' purchases has no greater or different effect upon interstate commerce than a general property tax to which the property involved may be lawfully subjected. Hence, whether accruing on mere storage or upon the physical incorporation of the chattels in appel-

lants' plants the tax is a valid exercise of the state's taxing power.

Objection of Southern Pacific Company that chattels purchased for use by utility may not have an earnings value equal to purchase price.

When its plant is assessed for *ad valorem* taxation, the utility may perhaps be heard to argue that the earnings value of its plant does not equal its replacement cost. But when purchasing and using materials necessary to the maintenance or extension of its plant, it surely cannot be held to stand on any other or different plane than any other taxpayer. Plainly it would not be relieved of any portion of a sales tax for the reason urged. Why should a different rule apply to a "use" tax?

Contention of Telephone Company that "Use" tax act was not intended to apply to articles not sold or manufactured in California.

In other words, counsel asks the Court to read into the California statute an exemption not there. Aside from appellants' failure to raise the question in its complaint and thus afford appellees an opportunity to present evidence bearing on legislative intent, the following, among many reasons, suggest themselves as completely refuting this contention:

(a) The California Use Tax Act of 1935 contains no clause either expressly or impliedly exempting from its operation the use of chattels not locally sold or produced;

(b) In plain language said Act taxes the local use of all chattels, irrespective of whether locally sold or

manufactured. Resort to interpretation for purpose of injecting judicial exemptions is not permissible;

(c) The enumeration of exceptions to a general statutory provision by necessary implication excludes all other exceptions. The California Act taxes the local use of all chattels purchased, and in section 4 enumerates certain specific exemptions. Since these exemptions fail to include chattels not locally sold or produced, it follows that no such exemption was intended;

(d) The true legislative intent was to tax the local use of the subject matter of all sales not directly taxable by reason of the Commerce Clause;

(e) The legislature intended a practicable tax measure. The construction contended for would make it wholly unworkable;

(f) The legislature intended a constitutional revenue measure. The construction contended for would make it violative of the equal protections clause. For taxation purposes, there could be no reasonable basis for placing the users of competitive articles in one class and those using non-competitive articles in another.

In *Pacific Tel. & Tel. Co. v. Henneford*, 95 Wash. Dec. 465, 81 Pac. (2d) 786, cited by counsel, the Washington supreme court seemingly based its decision solely on the legislative designation of the tax as a "compensating" tax, which is not true of the California measure. In any event, the Washington decision offends so many well-established rules of statutory construction as not to justify serious consideration as a precedent.

Contention that "use" tax act is extraterritorial in its operation and therefore violative of the due process

clause because the Southern Pacific Company stores materials and supplies in California for use in whole or in part elsewhere.

This, of course, would in no event constitute a valid objection to the tax in so far as its exaction is based on the actual incorporation of such materials in appellant's fixed plant in California.

In so far as taxable use includes storage, the objection would not apply to goods stored as part of interstate transportation, for such storage would be exempt from any kind of state taxation.

As to such articles, if any, as to which appellant's objection may be well taken, appellant may claim exemption and if the same is denied, may secure effective relief either at law or in equity.

Contention that "use" tax is imposable only if sole use is within the state, and that interstate telephone property, though physically present in California, is used in part elsewhere.

Section 3 of the California "use" tax act provides:

"An excise tax is hereby imposed on the storage, use or other consumption in this State of tangible personal property purchased from a retailer." etc. (Sec. 3, ch. 361, Laws of Calif. of 1935.)

It is to be noted that the tax is on the "use *or other consumption*" in California, thus clearly indicating that it was the actual, *physical* use involving actual consumption in California that was intended to be taxed—not such use of local switchboards, etc., as might be involved in interstate telephonic communication.

In sustaining the Washington "use" tax, the Court said in *Henneford v. Silas Mason Co.*, 300 U. S. 577, 582:

"The privilege of use is only one attribute, among many, of the bundle of privileges that make up property or ownership. * * * A state is at liberty, if it pleases, to tax them all collectively, or to separate the faggots and lay the charge distributively."

Just as it is the local use *in California* that constitutes one of the bundle of privileges making up that portion of the Telephone Company's property taxable *ad valorem* in California, so it is the local use of such property upon which that state may impose, and has imposed, a "use" tax. It has sought to tax the use of only local property, and as to this, to tax only that use which is within its jurisdiction, namely the physical use made of such property in California.

For the reasons urged, we respectfully submit that the decrees of the statutory three-judge district court should be sustained.

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R. G. SHARPE,
Assistant Attorney General of the State of Washington,

Amici Curiae.

SUPREME COURT OF THE UNITED STATES.

No. 212.—October Term, 1938.

Southern Pacific Company, Appellant,
vs.
Andrew J. Gallagher, Fred E. Stewart, Richard E. Collins, William G. Bonelli and Harry B. Riley, as Members of the State Board of Equalization of the State of California, et al.

Appeal from the District Court of the United States for the Northern District of California.

[January 30, 1939.]

Mr. Justice Reed delivered the opinion of the Court.

The California Use Tax Act of 1935[1] is assailed as violative of the commerce clause and the Fourteenth Amendment, when imposed upon tangible personal property, bought outside of the state by the Southern Pacific Company, an interstate railroad, and installed on importation, or kept available for use, as a part of its transportation facilities.

The attack comes by means of a bill of the Southern Pacific Company seeking, before a three-judge district court,[2] an interlocutory and final injunction against the State Board of Equalization of California, its members and the Attorney General of the state, to restrain them from enforcing the Use Tax Act.[3] The trial court granted an interlocutory injunction and denied a motion to dismiss[4] but later refused a permanent injunction and sustained the motion to dismiss.[5] The case comes here by appeal.[6]

The Use Tax Act is complemental to the California Retail Sales Tax Act of 1933.[7] The latter levies a tax upon the gross receipts

[1] Cal Stats. 1935, ch. 361.
[2] Sec. 266, Jud. Code, 28 U. S. C. A. § 380.
[3] As the bill was filed July 10, 1936, there was jurisdiction. 50 Stat. 738.
[4] Southern Pac. Co. v. Corbett, 20 Fed. Supp. 940.
[5] *Id.*, 23 Fed. Supp. 193.
[6] Sec. 266, Jud. Code, 28 U. S. C. A. § 380.
[7] Cal. Stats. 1933, ch. 1020, as amended, Cal. Stats. 1935, chs. 351, 355, 357.

of California retailers from sales of tangible personal property; the former[8] imposes an excise on the consumer at the same rate for the storage, use or other consumption in the state of such property when purchased from any retailer. As property covered by the sales tax is exempt under the use tax, all tangible personalty sold or utilized in California is taxed once for the support of the state government. Definitions in the Use Tax Act of taxpayer, retailer, storage and use are designed to make the coverage complete. A retailer is "every person, engaged in the business of making sales for storage, use or other consumption"; use is the exercise of any right or power incident to ownership, except sale in the regular course of business; storage is any "keeping or retention" with a similar exemption; and a taxpayer includes everyone "storing, using or otherwise consuming" the property subject to the use tax.[9]

The principle of the use tax as applied to property brought into the state after its retail purchase for intrastate use has been upheld in *Henneford* v. *Silas Mason Co.*,[10] against the charge that it was a tax upon the operations of interstate commerce or a tax upon a foreign sale, violative of the Fourteenth Amendment. Under the Washington statute, there considered, discrimination against interstate commerce, arising from a second exaction for use after a foreign tax on sale, could not exist as provision was made for a credit against the local tax of any such foreign levy. No such problem arises here by evidence, finding or assignment of error,[11] even though the California Act does not have this provision. It will be time enough to resolve that argument "when a taxpayer paying in the state of origin is compelled to pay again in the state of destination."[12] A discrimination against goods of out-of-state origin on the face of the sales and use acts is suggested because the local retailer may absorb the sales tax while the consumer of an imported article must pay the use tax.[13] But this is not a discrimination in the law. California's exaction for the distribution of tangible personal property is the same, whether purchased within or without her borders or whether paid by the retailer or

[8] California Use Tax Act, *supra*, Section 3.

[9] *Id.*, Sections 2, 3.

[10] 300 U. S. 577. Cf. Felt & Tarrant Mfg. Co. v. Gallagher, No. 302, October Term 1938, decided this day.

[11] New York v. Kleinert, 268 U. S. 646, 651.

[12] Henneford v. Silas Mason Co., 300 U. S. 577, 587.

[13] National Ice & Cold Storage Co. v. Pacific Fruit Express Co., 93 Cal. Dec. 442, 445-8.

consumer. There is an equal charge against what is used, whatever its source. In this case we have a distinctly different application of a use tax. The tax is not sought from personal property used in transactions entirely disassociated from any agency connected with interstate transportation, as builders' supplies for local work in the *Silas Mason* case, but from tangible personalty purchased out of the state for immediate or subsequent installation in an interstate railway facility.

The appellant, the Southern Pacific Company, a Kentucky corporation, handles intrastate, interstate and foreign commerce over its railroad system which traverses a number of states and connects with the lines of carriers covering the continent. The findings and stipulation of facts show continual extrastate purchases of tangible personalty for the operation of the road; rails, equipment, machinery, tools and office supplies. Some of the purchases are used in the general offices of the corporation, located in California, for the supervision of the wide-flung activities; others are for material kept in readiness as a stand-by supply to replace or repair equipment damaged, destroyed or worn out in the operation of the road; and still others are to make improvements, replacements or extensions pursuant to previously determined plans and specifications. Few, if any, of the supplies are stored for long term needs. Storage is merely incidental to protection until use, as office supplies in a closet or an extra frog at a section tool house. For construction or reconstruction upon a large scale, special orders are given and arrangements made, so that the material is fabricated for a particular use in the transportation facilities, shipped to its California destination and installed upon arrival. To avoid delay and cost the movement from loading to final placement is as nearly continuous as managerial efficiency can contrive. While some articles are capable of general use, the major purchases of rails, repair parts and supplies for the maintenance and operation of the system are adapted only to railroad use. The purchases are paid for out of railroad operating capital and move on company material waybills, without transportation charge. All purchases may be said to be dedicated to consumption in the interstate transportation business of appellant. No new rolling stock is involved. Subsequent to repairing and reconditioning, rolling stock moves again in interstate transportation, as do cars after being stocked with

supplies. The California tax on storage or use, it is said, cannot apply to these articles, as such a tax would be an unconstitutional burden upon the facilities of interstate commerce, of which the articles are a part.

There is agreement upon the principle involved. Appellant states that an excise tax imposed directly upon the privilege of using instrumentalities in carrying on interstate transportation is a direct and unconstitutional burden on commerce. Appellees do not dispute the premise but contend that the tax is on intrastate storage and use. They point to the definition of use as the exercise of a right of ownership, and of storage as any keeping or retention. By the definitive terms themselves, it is urged, the taxable events are retention and installation, not such storage as warehousing connotes, or use in the sense of consumption or operation. If we conclude retention and installation, under the circumstances here developed, are intrastate taxable events, viewed apart from commerce, we must still inquire whether taxes laid upon them are not in effect, upon commerce, and forbidden.[14]

Two lines of authority aid in considering the effect of this tax on commerce. The first makes it quite clear that a state tax upon the privilege of operating in, or upon carrying on, interstate commerce is invalid. States cannot tax interstate telegraph messages[15] or freight shipments.[16] A license tax on sales by samples burdens one selling only goods from other states.[17] A tax act as applied to the business of interstate communication[18] is unconstitutional. Where a similar levy by other states may be imposed, with consequent multiplicity of exaction on commerce for the same taxable event, local tax of a privilege, measured by total gross receipts from interstate transactions, is considered identical with an exaction on the commerce itself.[19] This rule is applicable to a tax on gross receipts from interstate transportation;[20] an occupation tax measured by gross receipts from radio broadcasting,[21] and a general tax

14 Cf. Ozark Pipe Line v. Monier, 266 U. S. 555.

15 Telegraph Company v. Texas, 105 U. S. 460.

16 Case of the State Freight Tax, 15 Wall. 232.

17 Robbins v. Shelby County Taxing District, 120 U. S. 489, 496, 497; Brennan v. Titusville, 153 U. S. 289.

18 Leloup v. Port of Mobile, 127 U. S. 640.

19 See the discussion in Gwin, White & Prince, Inc. v. Henneford, No. 7, October Term 1938, decided January 3, 1939.

20 Philadelphia Steamship Co. v. Pennsylvania, 122 U. S. 326, 336.

21 Fisher's Blend Station v. Tax Comm'n, 297 U. S. 650.

at specified rates upon the gross income of every resident, construed as "a tax upon gross receipts from commerce"[22] "without apportionment."[23] The measurement of a tax by gross receipts where it cannot result in a multiplication of the levies it upheld.[24]

Appellant selects from this line the *Helson* case[25] as determinative of the contention that a tax on use of supplies or equipment is a tax on the commerce. A state tax of three cents per gallon was imposed on all gasoline "sold at wholesale." This phrase was defined to include gasoline bought out of the state and used within the state. There was no definition of the word use or used. The taxpayers operated an interstate ferry, purchased gasoline in Ohio and used that portion sought to be taxed in propelling their craft in the territorial waters of Kentucky. The court considered the tax on the consumption of the gas the same as a tax on the operation of the ferry boat and therefore invalid under the rule discussed in the preceding paragraph.

The second line of authority supports the view that use and storage as defined in the California act are taxable intrastate events, separate and apart from interstate commerce. A recent discussion of the topic sets out the precedents in support of a ruling that a tax upon the production of power by the use of which compressors drove natural gas in interstate commerce is valid. Such production is a taxable event distinct from its consumption in commerce.[26] Particular attention is called by the state to the *Wallace* case.[27] There the tax was on "selling or storing or distributing gasoline." It became due on withdrawal from storage. The tax was held applicable to gasoline, purchased out of the state and stored in the state, "when all is withdrawn and used . . . as a source of motive power in interstate railway operation" and valid against the objection that "it is in effect a tax upon the use" in interstate

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[22] Adams Mfg. Co. v. Storen, 304 U. S. 307, 311.

[23] For comparison with sovereign immunity rule and reason for variation, see James v. Dravo Contracting Co., 302 U. S. 134, 157, 158.

[24] Western Live Stock v. Bureau of Revenue, 303 U. S. 250, 256, and cases cited. Coverdale v. Arkansas-Louisiana Pipe Line Co., 303 U. S. 604, 612; Aitken v. Shelby County Taxing District, 145 U. S. 1; and American Mfg. Co. v. St. Louis, 250 U. S. 459, as explained in Gwin, White & Prince, Inc. v. Henneford, *supra*, and Adams Mfg. Co. v. Storen, *supra*, 312.

[25] Helson and Randolph v. Kentucky, 279 U. S. 245; see also Bingaman v. Golden Eagle Lines, 297 U. S. 626.

[26] Coverdale v. Pipe Line Co., 303 U. S. 604, 609.

[27] Nashville, C. & St. L. Ry. v. Wallace, 288 U. S. 249.

commerce.[28] The invalidity of such a tax arises from a levy on commerce itself or its gross receipts, not upon events prior to the commerce.[29]

The principle illustrated by the *Helson* case forbids a tax upon commerce or consumption in commerce. The *Wallace* case, and precedents analagous to it, permit state taxation of events preliminary to interstate commerce. The validity of any application of a taxing act depends upon a classification of the facts in the light of these theories. In the present case some of the articles were ordered out of the state under specification suitable only for utilization in the transportation facilities and installed immediately on arrival at the California destination. If articles so handled are deemed to have reached the end of their interstate transit upon "use or storage," no further inquiry is necessary as to the rest of the articles which are subjected to a retention, by comparison farther removed from interstate commerce. We think there was a taxable moment when the former had reached the end of their interstate transportation and had not begun to be consumed in interstate operation. At that moment, the tax on storage and use — retention and exercise of a right of ownership, respectively—was effective. The interstate movement was complete. The interstate consumption had not begun. *Champlain Co.* v. *Brattleboro*[30] and *Carson Petroleum Co.* v. *Vial*[31] are therefore inapplicable. *Bacon* v. *Illinois*,[32] where taxation of grain during stoppage in transit was validated, presents a closer analogy. "Practical continuity" does not always make an act a part of interstate commerce.[33] This conclusion does not give preponderance to the language of the state act over its effect on commerce. State taxes upon national commerce or its incidents do not depend for their validity upon a choice of words but upon the choice of the thing taxed. It is true, the increased cost to the interstate operator from a tax on installation is the same as from a tax on consumption or operation.

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28 *Id.*, 265-66; see Edelman v. Boeing Air Transport, 289 U. S. 249, 252; Gregg Dyeing Co. v. Query, 286 U. S. 472, 479.

29 *Id.*, 267.

30 260 U. S. 366.

31 279 U. S. 95.

32 227 U. S. 504.

33 Oliver Mining Co. v. Lord, 262 U. S. 172; Hope Natural Gas Co. v. Hall, 274 U. S. 284; Utah Power & L. Co. v. Pfost, 286 U. S. 165.

This is not significant.[34] The prohibited burden upon commerce between the states is created by state interference with that commerce, a matter distinct from the expense of doing business. A discrimination against it, or a tax on its operations as such, is an interference. A tax on property or upon a taxable event in the state, apart from operation, does not interfere. This is a practical adjustment of the right of the state to revenue from the instrumentalities of commerce and the obligation of the state to leave the regulation of interstate and foreign commerce to the Congress.

But it is urged by the appellant that our former opinions make this conclusion a departure from precedent; the events are so close to or so inseparably intertwined with interstate commerce, as to be a part of it.[35] *Cooney* v. *Mountain States Telephone Co.*[36] is cited to show that a "state excise tax cannot be validly applied indiscriminately and without apportionment to an instrumentality common to interstate and intrastate commerce." The Telephone Company was taxed a sum on each telephone in use. As the instrument was employed part of the time in interstate commerce, this Court held the tax to be upon that commerce and invalid. Since there was no apportionment the entire tax fell. Unless the taxable events here, all of which are intrastate, are in effect a part of interstate commerce, our previous discussion of their separable character would render the *Cooney* case inapplicable. For this point we are referred to *Puget Sound Co.* v. *Tax Commission*[37] and *Ozark Pipe Line* v. *Monier.*[38]

In the former case, the distinction in the opinion between stevedoring in loading and unloading interstate cargoes, held non-taxable as a burden upon commerce, and the business of supplying longshoremen for others to load and unload, held taxable as a local business, is applicable here. The invalid tax in the *Puget Sound* case was on the business of stevedoring, measured by a percentage of gross receipts from interstate activity. The valid tax was a similar percentage on the local activity as an employment agency. Here, under our analysis, we find only intrastate events taxed.[39]

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[34] Western Live Stock v. Bureau, 303 U. S. 250, 254, and cases cited.

[35] Cf. Henneford v. Silas Mason Co., 300 U. S. 577, 583.

[36] 294 U. S. 384.

[37] 302 U. S. 90.

[38] 266 U. S. 555.

[39] Under the commerce clause the regulatory power of the Congress is customarily exercised on transactions taking place within the state on the principle

In the *Ozark* case, Missouri sought to justify a franchise tax on a company engaged in the operation of an interstate pipe line by suggesting the tax was upon certain intrastate events, such as operation of communications, repair and purchase of supplies. The tax was forbidden because on the privilege of doing an exclusively interstate business. The opinion is to be read in the light of the statement by the Court of its interpretation of the facts and legal deductions which control its decision. The Missouri Act called for a franchise tax of a percentage of the par of its stock, apportioned to its assets in that state. This Court said that "the tax is one upon the privilege or right to do business," and as the taxpayer "is engaged only in interstate commerce" the tax "constitutionally cannot be imposed." There was then added this paragraph:

"The maintenance of an office, the purchase of supplies, employment of labor, maintenance and operation of telephone and telegraph lines and automobiles, and appellant's other acts within the State, were all exclusively in furtherance of its interstate business; and the property itself, however extensive or of whatever character, was likewise devoted only to that end. They were the means and instrumentalities by which that business was done and in no proper sense constituted, or contributed to, the doing of a local business. The protection against imposition of burdens upon interstate commerce is practical and substantial and extends to whatever is necessary to the complete enjoyment of the right protected."[40]

This Court pointed out that the corporation had a license to engage exclusively in interstate business.[41] The language just quoted shows that this Court interpreted the transactions in Missouri as merely a part of the interstate commerce and the tax on the franchise an interference therewith because a tax directly upon it.[42] " . . . nothing was done in Missouri except in furtherance of transportation."[43] It was this conclusion of the Court on the factual situation which brought about the *Ozark* decision. Where there is also intrastate activity, an apportioned state franchise tax on for-

that such acts are an essential part of interstate commerce. See Currin v. Wallace, No. 275, October Term 1938, decided this day, and cases cited. Cf. Townsend v. Yeomans, 301 U. S. 441.

[40] 266 U. S. 555, 565.

[41] *Id.*, 567.

[42] Anglo-Chilean Corp. v. Alabama, 288 U. S. 218, 224; *id.*, minority, 236; Virginia v. Imperial Coal Co., 293 U. S. 15, 20.

[43] Southern Gas Corp. v. Alabama, 301 U. S. 148, 155.

eign corporations doing an interstate business is upheld.[44] A franchise tax on an exclusively interstate business is a direct burden; proportioned to an intermingled business, it is valid.[45] Since the incidence of the California tax as here interpreted is upon events outside of interstate commerce, the *Ozark* opinion is not applicable. There the Missouri tax was upon activities found wholly interstate.

Finally, appellants urge that the tax violates the due process clause of the Fourteenth Amendment because exacted for consumption of office and car supplies outside the state, upon their appropriation in California by the general office to the use of the whole system.[46] This contention falls with the determination that the taxable event is the exercise of the property right in California. This Court declined to accept a similar argument in the *Silas Mason Company* case.[47]

Affirmed.

Mr. Justice BLACK concurs in the result.

Mr. Justice ROBERTS took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[44] *Id.*, 156.

[45] See also Atlantic Lumber Co. v. Comm'r, 298 U. S. 553, 556.

[46] James v. Dravo Contracting Company, 302 U. S. 134; Connecticut Gen'l Life Ins. Co. v. Johnson, 303 U. S. 77; Frick v. Pennsylvania, 268 U. S. 473; Great Atlantic & Pacific Tea Company v. Grosjean, 301 U. S. 412; International Paper Co. v. Massachusetts, 246 U. S. 135.

[47] Henneford v. Silas Mason Co., 300 U. S. 577, 578.

SUPREME COURT OF THE UNITED STATES.

No. 212.—October Term, 1938.

Southern Pacific Company, Appellant,
vs.
Andrew Gallagher, Fred E. Stewart, Richard E. Collins, William G. Bonelli and Harry B. Riley, as members of the State Board of Equalization of the State of California, et al.

Appeal from the District Court of the United States for the Northern District of California.

[January 30, 1939.]

Mr. Justice Butler.

Mr. Justice McReynolds and I are of opinion that the judgment should be reversed.

The facts stated in the opinion just announced leave nothing of substance to support its conclusion that the California tax is not upon the operation—maintenance and use—of appellant's railroad for interstate transportation. Discussion can neither obscure nor more plainly disclose the truth that the tax in question directly burdens commerce among the States. Concededly, that is repugnant to the commerce clause as, from the beginning, it has been construed by this Court.